(25,218)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 935.

CHARLES F. RUDDY, PLAINTIFF IN ERROR,

vs.

HERMAN J. ROSSI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

INDEX.

	Original.	Print
Writ of error	*a*	1
Clerk's return to writ of error	*b*	1
Transcript of record from the district court of Shoshone county	*c*	1
Complaint	1	3
Demurrer	3	4
Order overruling demurrer	4	4
Answer	4	5
Stipulation as to facts, &c.	6	6
Exhibit A—Opinion of Thompson, Assistant Secretary, on appeal from General Land office	9	7
B—Patent 289,309, to Ruddy	12	9
C—Amended complaint	14	10
D—Bill of particulars	17	11
Findings of fact and conclusions of law	21	13
Judgment	24	15
Clerk's certificate to judgment roll	26	16
Notice of appeal	27	16
Certificate as to undertaking on appeal	28	17

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1916.

	Original.	Print
Præcipe for record	28	17
Clerk's certificate	30	17
Stipulation as to record, &c	31	18
Journal entry of hearing	33	19
Judgment	34	19
Opinion, Budge, J.	35	20
Opinion, Sullivan, C. J., dissenting	47	26
Petition for rehearing	51	28
Order denying petition for rehearing	61	35
Petition for a writ of error	62	36
Assignment of errors	64	37
Order allowing writ of error	66	38
Bond on writ of error	67	38
Return of service on citation	70	40
Citation	71	40
Præcipe for transcript of record	72	41
Clerk's certificate	74	42

a THE UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Idaho, Greeting:

Because in the record and proceeding-, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Idaho, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Charles F. Ruddy and Herman J. Rossi, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision was in favor, of such, their validity; or wherein was drawn in question the construction of a clause of the constitution or of a treaty, or a statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Charles F. Ruddy, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all *States*, together with this writ, so that you have the same at Washington on the 19th day of March 1916, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said
b Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White Chief Justice of the United States the 19th day of February, A. D. 1916.

[Seal United States District Court, Idaho, 1890.]

W. D. McREYNOLDS,
Clerk of the District Court of the United States for the District of Idaho.

Allowed.
ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of Idaho.

c [Endorsed:] In the Supreme Court of the State of Idaho. Charles F. Ruddy, Plaintiff in Error, vs. Herman J. Rossi, Defendant in Error. Writ of Error. A. H. Featherstone & C. E. Miller, Attorneys for Plaintiff in Error. Lodged Feb. 19, 1916. I. W. Hart, Clerk.

1—935

d CHARLES F. RUDDY, Plaintiff in Error,
vs.
HERMAN J. ROSSI, Defendant in Error.

Return to Writ.

UNITED STATES OF AMERICA,
Supreme Court of Idaho, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Idaho, in the City of Boise, this March 10, 1916.

I. W. HART,
Clerk Supreme Court of Idaho.

Costs of Suit.

Plaintiff's costs, $5.25, paid by Charles F. Ruddy.
Defendant's costs, $87.40, paid by Herman J. Rossi.
Costs of transcript, $34.75, paid by Charles F. Ruddy.

[Seal of Supreme Court, State of Idaho.]

I. W. HART, *Clerk.*

e In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Respondent,
vs.
HERMAN J. ROSSI, Appellant.

TRANSCRIPT ON APPEAL.

Appeal from the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

Filed this 5th day of March, 1915. I. W. Hart, Clerk, by S. M. West, Deputy.

Allen & Allen, Spokane, Wash.; A. H. Featherstone, Wallace, Idaho, Attorneys for Respondent.

Water H. Hanson, James A. Wayne, Wallace, Idaho, Attorneys for Appellant.

1 In the District Court of the First Judicial District of the State of Idaho in and for Shoshone County.

CHARLES F. RUDDY, Plaintiff,
vs.
HERMAN J. ROSSI, Defendant.

Complaint.

Comes now the plaintiff in the above entitled cause, and complaining of the defendant for a cause of action alleges:

I.

That on August 26, 1912, by a patent issued on that date the plaintiff herein acquired title from the United States of America, under and by virtue of a compliance of the Homestead Laws of the United States, to the Northeast Quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) of Section 34, in Township 48, North of Range 4 East of the Boise Meridian, containing 40 acres, in Shoshone County, Idaho, and ever since said date the plaintiff has and still holds title thereto.

II.

That the defendant herein has obtained various judgments against the plaintiff and has filed various attachments upon the property of the plaintiff, which said judgments and attachments are more particularly described as follows:

Judgment for $931.87 and interest at 7 per cent per annum from May 8, 1914, in the case of Herman J. Rossi vs. Charles F. Ruddy, in the above entitled court, being case number
2 3440, said judgment being entered in Docket "C", on page 128.

Judgment for $2,115.48, with interest at 7 per cent per annum from May 12, 1914, and costs amounting to $19.05, in a cause wherein Herman J. Rossi is plaintiff and Charles F. Ruddy is defendant, being case number 3214, in the above entitled court and county, which said judgment is entered in Docket "C" on page 129.

III.

That said defendant has also filed attachments in each of said cases upon the property above described.

IV.

That said defendant claims that said judgment and attachments are a lien upon said property and will unless restrained by order of this court, sell said property under said attachments and under said judgments, and that the said attachments and judgments are a cloud upon the title of the plaintiff in and to said lands, which cloud

ought in equity be removed; that the indebtedness upon which said judgments and attachments are based, and each and every item thereof, were contracted by the plaintiff herein prior to the date of the issuance of the patent to said homestead, to-wit: prior to August 26, 1912, and the same are by the provisions of Section 2296 of the Revised Statutes of the United States not a lien upon said
3 land, and not liable to the satisfaction of said debts, or any of them, said Section 2296 being as follows:

"Section 2296. No lands acquired under the provision of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

Wherefore plaintiff prays the decree of this court that said judgments and attachments are not a lien upon the property described herein, and for a further decree enjoining the defendant herein from in any wise selling or attempting to sell the said lands, or any part thereof, to satisfy said judgments or attachments, or any of them, and barring and foreclosing the defendant from asserting or claiming any lien or right of sale against said land under and by virtue of said judgments or attachments.

ALLEN & ALLEN,
Residing at Spokane, Washington;
A. H. FEATHERSTONE,
Residing at Wallace, Idaho,
Attorneys for Plaintiff.

Duly verified.
Filed Jun. 26, 1914, at 4 o'clock p. m.

(Title of Court and Cause.)

Demurrer.

Comes now the defendant, Herman J. Rossi, and demurs to plaintiff's complaint and for grounds of demurrer alleges:

4 I.

That the said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WALTER H. HANSON,
JAMES A. WAYNE,
Attorneys for Defendant.

Service of the within demurrer is admitted this 24th day of July, 1914.

ALLEN & ALLEN,
A. H. FEATHERSTONE,
Attorneys for Plaintiff.

Filed July 24, 1914.

Court Journal "I", Page 538.

Regular September, 1914, Term, Second Judicial Day, September 15th, A. D. 1914.

At this day the demurrer to the complaint herein was submitted to the Court without argument and by the Court overruled and the defendant granted ten days in which to answer.

(Title of Court and Cause.)

Answer.

Comes now the defendant above named and for answer to plaintiff's complaint herein admits, denies, qualifies and alleges as follows, to-wit:

5 I.

Defendant admits that on or about August 26th, 1912, the lands described in paragraph I of plaintiff's complaint herein were patented by the United States of America to the plaintiff; but denies that plaintiff acquired title thereto under or by virtue of a compliance with the homestead laws of the United States, or under or by virtue of a compliance with any laws of the United States.

And further answering paragraph I of said complaint defendant denies that the plaintiff ever since the 26th day of August, 1912, has held title to said lands and denies that plaintiff now holds title thereto.

II.

Defendant denies that he has by attachment judgement or otherwise placed any cloud upon the title of plaintiff to said lands, which cloud ought in equity to be removed; defendant denies that the indebtedness upon which said judgements and attachments are based were contracted by the plaintiff prior to the date of the issuance of the patent to said lands and denies that each and every item thereof were contracted by the plaintiff prior to the date of the issuance of the patent to said lands; defendant further denies that said judgements are not a lien upon said lands either under or by virtue of the provisions of Section 2296 of the Revised Statutes of the United States or of any other statute or law whatsoever, and denies

6 that said lands are not liable to the satisfaction of said judgments and the debts upon which said judgements were obtained.

Wherefore, defendant prays that plaintiff take nothing by his said action and that said action be dismissed, and that defendant recover his costs and disbursements herein.

WALTER H. HANSON,
Attorney for Defendant.

Residence and Post Office Address: Wallace, Idaho.

JAMES A. WAYNE,
Attorney for Defendant.

Residence and Post Office Address: Wallace, Idaho.

Duly verified.

Service of the within answer is admitted this 9th day of Oct. 1914.

ALLEN & ALLEN,
Attorney- for Plaintiff.
A. H. FEATHERSTONE.
C.

Filed Oct. 16, 1914.

(Title of Court and Cause.)

Stipulation.

It is stipulated between the parties that the facts in issue upon which this case shall be decided are as follows:

1 That this case is based upon an exerution issued on a judgment rendered in the case between the same parties in this
7 county and numbered 3214 and also the case between the same parties in this county being No. 3440, this being an attempt to subject to execution and sale upon judgments in those two cases the property described in the complaint, title to which was obtained by plaintiff under the homestead laws.

2. It is stipulated that final proof was submitted by the plaintiff on his homestead on October 4th, 1909, and certificate of final entry or receiver's receipt issued November, 12, 1909; that subsequently a protest was filed against the homestead entry which protest was not decided until May 3rd, 1912, as shown by a copy of the letter from the Assistant Secretary of the Interior attached hereto as an Exhibit in the case and marked Exhibit "A".

3. It is stipulated that patent for the homestead was issued on August 20th, 1912, as shown by the certified copy of the patent attached hereto marked Exhibit "B" and stipulated to be an exhibit in the case.

4. It is further stipulated that the items of the case entered upon which judgment in case No. 3214 is based, all accrued between September 22, 1909, and August 9th, 1912, as shown by the amended complaint in case No. 3214 which amended complaint is hereby stipulated to be an exhibit in this case marked Exhibit "C" and that said judgment is entered in Docket "C" page 128, and also shown by bill of particulars filed in case No. 3214, which bill of particulars is hereby stipulated to be an exhibit in the case Marked
8 Exhibit "D", the defendant, however, objecting to the introduction of Exhibit "C" being the amended complaint in case No. 3214, and Exhibit "D" being the bill of particulars in case No. 3214, upon the ground that each of said exhibits is incompetent, irrelevant and immaterial, and it being stipulated that defendant saves an exception to the introduction of each of said exhibits.

5. It is hereby stipulated that the notes upon which the judgment of $631 87 including costs being case No. 3440 as entered in Docket "C" at page 128 was rendered, were all dated and the debts incurred prior to the date of the issuance of the receiver's receipt, to-wit, prior to November 12th, 1909.

6. It is further stipulated that the case shall be submitted to the

Court for a decision upon the foregoing state of facts and that the plaintiff herein shall have until December 4th to file his brief and the defendant shall have until and including December 12th to file his brief and that the plaintiff shall have three days to reply to the brief of the defendant, and the defendant shall have three days thereafter to reply to the brief of the plaintiff.

7. It is further stipulated that the amended complaint and bill of particulars in case No. 3214 need not be attached but copies thereof may be substituted and that the Court may consider the originals on file subject to objection of defendant and exception above noted.

ALLEN & ALLEN,
A. H. FEATHERSTONE,
Attorneys for Plaintiff.
JAMES A. WAYNE,
WALTER H. HANSON,
Attorneys for Defendant.

EXHIBIT "A."

Department of the Interior.

WASHINGTON, May 3, 1912.

Address only The Secretary of the Interior.

D-20531.

"K."

Cœur d'Alene, 01576.

Contested Homestead Final Proof. Affirmed.

HERMAN G. BERGMAN
v.
CHARLES F. RUDDY.

Appeal from the General Land Office.

Appeal is filed by Herman G. Bergman from decision of October 13, 1911, of the Commissioner of the General Land Office affirming the action of the receiver, the register being disqualified as hereinafter shown, and dismissing said Bergman's contest initiated by his contest affidavit filed July 8, 1910, protesting against the final proof submitted October 4, 1909, by Charles F. Ruddy, certificate issuing November 12, 1909, on his homestead entry made August 6, 1903, for the N. E. ¼ N. W. ¼, Sec. 34, T. 48 N. R. 4 E. B. M. Cœur d'Alene, Idaho, land district, and alleging that said lands are used in part for urban purposes and occupied as a townsite as an addition to the City of Wallace, Idaho.

Hearing was duly had on said contest, at which both parties appeared and presented testimony, upon consideration of which the receiver, the register being disqualified by reason of having been Ruddy's attorney in a former contest affecting this land, found that said entryman "settled on the land in controversy November 1, 1899, and that he has continued to cultivate and improve the land and make it his home", and held that "the evidence clearly shows the prior right of Charles F. Ruddy the contestee to the land in controversy by reason of prior settlement and improvements thereon"; referring to the contest case of Margaret Mallon v. Chales F. Ruddy closed by decision of the Department dated February 18, 1909. The Commissioner on appeal held that the issues involved in Bergman's contest are the same as those raised in said former contest, which was decided in favor of the entryman, and affirmed the decision of the receiver accordingly.

The Department has carefully reviewed the record, and finds the facts in this case as shown thereby to be substantially the same, as to the occupancy of this land for urban or townsite purposes, as set forth in the Department's decision of February 18, 1909, in the former contest case referred to. The same need not therefore be repeated herein. The department adheres to the conclusions
11 reached in that decision that no such townsite appropriation or urban use and occupation of said lands existed in this case as exempted said lands from this homestead entry.

The testimony fails to show any special equities in favor of Bergman which differentiate his case from that of others interested in the former contest, three of whom were, at the hearing herein, admitted on motion of the contestee as cocontestants with Bergman, it appearing that they had agreed to share with him the expenses of this contest. It appears that the cabin or house in which he has continued to live since 1899 is actually located outside of the limits of the 40 acres tract embraced in this entry and of the tract in the southeast corner thereof as to which Ruddy posted on November 1, 1899, and recorded November 7, 1899, a possessory claim under the laws of the State of Idaho for agricultural and pasturage uses. Bergman appears to have since then attempted to make use of a very small portion of the land embraced in said entry and which is embraced also in the alleged addition to the city of Wallace, held in the former contest to have no such legal existence as to effect this entry. A protest filed September 30, 1909, by the mayor of said city, under authority of the city council, against this entry was withdrawn, by authority of said council, November 12, 1909.

The Department upon careful consideration of the entire
12 record concurs in the conclusions reached. Bergman's contest is therefore dismissed.

The decision appealed from is affirmed, and the entry will pass to patent.

CAMIE A. THOMPSON,
Assistant Secretary.

EXHIBIT "B."

Instrument Number 29119.

Cœur d'Alene, 01576.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, a Certificate of the Register of the Land Office at Cœur d'Alene, Idaho, has been deposited in the General Land Office, whereby it appears that, pursuant to the Act of Congress of May 20, 1862, "To Secure Homesteads to Actual Settlers on the Public Domain," and the acts supplemental thereto, the claim of Charles F. Ruddy has been established and duly consummated, in conformity to law, for the northeast quarter of the northwest quarter of section thirty-four in township forty-eight north of range four east of the Boise Meridian, Idaho, containing forty acres, according to the Official Plat of the Survey of the said Land, returned to the General Land Office by the Surveyor-General:

13 Now know ye, that there is, therefore, granted by the United States unto the said claimant the tract of Land above described; to have and to hold the said tract of Land, with the appurtenances thereof, unto the said claimant and to the heirs and assigns of the said claimant forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

In testimony whereof, I, William H. Taft, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twenty-sixth day of August in the year of our Lord one thousand nine hundred and twelve and of the Independence of the United States the one hundred and thirty-seventh.

By the President:

WM. H. TAFT,
By M. P. LE ROY, *Secretary.*

[Seal of the General Land Office.]

JOHN O'CONNELL,
Acting Recorder of the General Land Office.

14 Recorded: Patent Number 289309.
Recorded at the request of Charles F. Ruddy Sep. 6, 1912 at 10 o'clock A. M.

JOHN P. SHEEHY,
County Recorder.

STATE OF IDAHO,
County of Shoshone, ss:

I, John P. Sheehy, County Recorder in and for the County of Shoshone, State of Idaho, do hereby certify the foregoing to be a full, true and correct copy of a United States Patent issued to Charles F. Ruddy as the original instrument appears upon the records of said County, in Book "43" of Deeds at page 213 thereof at my office and in my custody.

In testimony whereof, I hereunto set my hand and affix my official seal this ninth day of January A. D. 1913.

[SEAL.] JOHN P. SHEEHY,
County Recorder.

EXHIBIT "C."

In the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone.

No. 3214.

HERMAN J. ROSSI, Plaintiff,
vs.
CHARLES F. RUDDY, Defendant.

Amended Complaint.

Comes now the plaintiff above named and by leave of the
15 court first had and obtained, files this, his amended complaint in the above entitled action, and for first cause of action against the defendant alleges:

I.

That between the dates September 22nd, 1909, and August 9th, 1912, the plaintiff at the request and for the benefit of the defendant advanced to the defendant various sums of money and furnished various policies of fire insurance to the defendant, insuring the defendant's property against loss by fire, under an agreement had between the plaintiff and the said defendant, that the said defendant should pay the plaintiff on all such sums of money so advanced and upon all of the costs and expense of furnishing such policies of fire insurance interest at the rate of 12 per cent per annum payable monthly.

II.

That the defendant is now indebted to the plaintiff in the sum of $3078.05 upon a general balance of account for cash so advanced and furnished by the plaintiff to the defendant, and for policies of fire insurance so furnished by the plaintiff to the defendant insuring the defendant's property against loss by fire, all at the special instance and request of the defendant at Wallace, Idaho, during said

period embraced between the dates September 22nd, 1909, and August 9th, 1912.

16 III.

That no part of said sum of $3078.05 has been paid and that the whole thereof is now unpaid, due and owing from the defendant to the plaintiff.

Wherefore, plaintiff prays judgment against the defendant for the sum of $3078.05 with interest thereon from this date at the rate of 7 per cent per annum until the same shall be paid, and for plaintiff's costs and disbursements expended in this action.

JAMES A. WAYNE,
Residence and Post Office Address: Wallace, Idaho;
WALTER H. HANSON,
Residence and Post Office Address: Wallace, Idaho;
Attorneys for Plaintiff.

STATE OF IDAHO,
County of Shoshone, ss:

Herman J. Rossi, being first duly sworn upon his oath deposes and says: that he is the plaintiff in the above entitled action, that he has read the within and foregoing amended complaint, knows the contents thereof, and that the same is true he verily believes.

HERMAN J. ROSSI.

Subscribed and sworn to before me this 22nd day of November, 1913.

[SEAL.] J. H. WIXOM,
Notary Public.

17 EXHIBIT "D."

In the District Court of the First Judicial District of the State of Idaho in and for the County of Shoshone.

No. 3214.

HERMAN J. ROSSI, Plaintiff,
vs.
CHARLES F. RUDDY, Defendant.

Bill of Particulars.

To Charles F. Ruddy, defendant, and to Featherstone & Fox and Allen and Allen, attorneys for said defendant:

You will please take notice that there is attached hereto and furnished herewith the statement of account or bill of particulars heretofore demanded herein by the defendant from the plaintiff.

Dated at Wallace, Idaho, this 26th day of September, A. D. 1912.

WALTER H. HANSON,
Attorney for Plaintiff, Wallace, Idaho.

WALLACE, IDAHO, August 9th, 1912.

Charles F. Ruddy in Account with Herman J. Rossi.

1907.		Dr.	1907.	Cr.
Oct. 19.	Cash	$400.00	Nov. 4.	$20.00
Dec. 31.	Cash—Chimney Top	5.00	" 9.	25.00
" 31.	Discount & Interest	8.50	Dec. 2.	20.00
1908.			1908.	
Jan. 2.	Wallace B. & T. Leroy Phillips	50.00	Jan. 4.	20.00
18				
Jan. 4.	Bank Daxon House Taxes	$7.05	Jan. 4.	$25.00
" 4.	" Placer Creek & Poll Tax	11.05	Feb. 25.	15.00
Feb. 25.	" Sight Draft	100.00	" 25.	20.00
Apr. 21.	Western Policy $5104768	6.75	M'ch 16.	20.00
M'ch 30.	State Bank	75.00	" 30.	15.00
May 4.	" "	100.00	Apr. 4.	25.00
" 20.	Cash	25.00	" 29.	15.00
June 8.	"	10.00	Oct. 9.	30.00
Oct. 31.	Home Policy Premium	7.00	Nov. 2.	10.00
			Nov. 4.	30.00
			Nov. 9.	20.00
			Dec. —.	45.00
			" 29.	20.00
1909.			1909.	
Jan. 1.	Discount and Interest	41.60	Feb. 2.	20.00
Apr. 21.	Western Policy No. 5109304	6.75	M'ch 16.	20.00
" 16.	Cash—Paid Boy	2.00	Apr. 5.	100.00
Jul- 15.	Bank	50.00	Oct. 1.	500.00
" 22.	State Bank	150.00	" 13.	300.00
" 28.	Cash	5.00	" 18.	100.00
Aug. 3.	H. M. Thostensen	80.30	Nov. 20.	1,389.27
" 9.	Western Policy No. 5109320	15.00		
" 9.	Home Policy No. 709	24.00		
" 9.	Cash	95.00		
Sept. 7.	"	10.00		
19				
Sept. 11.	Discount and Interest on $500 loan	50.00		
" 11.	Cash	500.00		
Oct. 26.	Cash	100.00		
" 22.	Bank Exchange, Clintonville, Wis.	.50		
Nov. 2.	Wallace Bank	150.00		
" 23.	Sight Draft	100.00		
" 10.	" "	150.00		
Dec. 11.	Bank Sight Draft	50.00		
" 15.	" " "	100.00		
" 15.	" Exchange	1.38		
		$2,481.88		$3,629.27
	Difference to apply on m't'g	1,147.39		
		$3,629.27		$3,629.27

Chas. F. Ruddy in Account with Herman J. Rossi.

1910.		Dr.	Cr.
Jan. 3.	Cash, Fumigation	$1.25	
" 14.	" Floyd Stockings	1.00	
" 29.	" " to Spokane	5.00	
" 20.	Bank Bimetallic Assessment	30.00	
" 6.	" Sight Draft	100.00	
" 21.	" " "	100.00	

20

Feb.	1.	Cash Floyd	11.00
"	8.	" Sight Draft	100.00
M'ch	23.	" " "	20.00
"	30.	" State Bank	100.00
"	28.	" Bank	100.00
Apr.	2.	Cash	30.00
"	6.	" State Bank	100.00
"	14.	Cash	20.00
"	15.	"	50.00
"	24.	"	10.00
"	27.	" Telegram	.90
"	26.	" Bank	200.00
"	30.	" "	26.25
May	16.	" "	102.50
"	24.	Cash	60.00
"	26.	" Bank	20.00
"	6.	" "	100.00
"	11.	" "	100.00
Jun-	22.	" Hospital	90.00
Jul-	7.	Cash	20.00
Aug.	30.	Cash State Bank Draft	100.00
Oct.	1.	Cash " " "	100.00
"	22.	Cash	5.00
Oct.	26.	"	15.00
Nov.	19.	Cash	10.00

21

1911.

M'ch	1.	Bank	50.00
"	1.	" White & Bender	4.65
"	1.	Bank	20.00
May	9.	Bank of Commerce	20.00
Jul-	1.	Cash Circus Day	5.00
"	12.	Bank	50.00
Aug.	2.	Cash	10.00
"	31.	Bank	30.00
Oct.	23.	North Coast $26941	2.00
Aug.	1.	Western $5384328	11.25

1912.

Apr.	3.	Cash	5.00
Aug.	2.	Merriam & Merriam, Alexandria	15.00
"	9.	Home of N. Y. ins. $906	16.80
		Telegrams	2.45
		Int. Jan. 1910 to Aug. 24, 1912	514.49
			$2,484.54

Filed Dec. 4, 1914.

(Title of Court and Cause.)

Findings of Fact and Conclusions of Law.

The above entitled cause, having been heretofore by stipulation of the respective parties by and through their respective attorneys *having been* submitted to the Court for decision upon an agreed statement of facts, and the plaintiff having appeared by his
22 attorneys Messrs. Allen & Allen and A. H. Featherstone and the defendant appearing by his attorneys James A. Wayne, Esq. and Walter H. Hanson, Esq. and said parties having filed

their briefs herein, *and* the Court now finds the facts as follows, to-wit, and the objections of defendant to the introduction of transcripts of judgment and record in certain cases being overruled:

I. That on August 26th, 1912, by a patent issued on that date the plaintiff herein acquired title from the United States of America, under and by virtue of a compliance with the Homestead Laws of the United States, to the Northeast quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) of Section 34, in Township 48 North of Range 4 East of Boise Meridian, containing 40 acres, in Shoshone County, Idaho, and ever since said date the plaintiff has and still holds the title thereto.

II. That the defendant herein has obtained various judgments against the plaintiff and has filed various attachments upon the property of the plaintiff, which said judgments and attachments are more particularly described as follows:

Judgment for $931.87 and interest at 7 per cent per annum from May 8th, 1914, in the case of Herman J. Rossi vs. Charles F. Ruddy in the above entitled Court, being case number 3440, said judgment being entered in Docket "C" on page 128.

Judgment for $2,115.48 with interest at 7 per cent per
23 annum from May 12, 1914, and costs amounting to $19.05 in a cause wherein Herman J. Rossi is plaintiff and Charles F. Ruddy is defendant, being case number 3214, in the above entitled court and county, which said judgment is entered in Docket "C" on page 129.

III. That said defendant has also filed attachments in each of said cases upon the property above described.

IV. That said defendant claims that said judgments and attachments are a lien upon said property and will unless restrained by order of this court, sell said property under said attachments and under said judgments, and the said attachments and judgments are a cloud upon the title of the plaintiff in and to said lands, which cloud ought in equity to be removed; that the indebtedness upon *said* which said judgments and attachments are based, and each and every item thereof, were contracted by the plaintiff herein prior to the date of the issuance of the patent to said homestead, to-wit: prior to August 26th, 1912, and the same are by the provisions of Section 2296 of the Revised Statutes of the United States not a lien upon said land, and not liable to the satisfaction of said debts, or any of them, said Section 2296 being as follows:

"Section 2296. No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

As conclusions of law from the foregoing facts the Court finds
that plaintiff is entitled to a decree that said judgments and
24 attachments are not a lien upon the property described herein, and enjoining the defendant herein from in any manner selling or attempting to sell said lands or any part thereof to satisfy said judgments or attachments, and removing the cloud against plaintiff's property by barring and foreclosing the defendant from asserting or claiming any right or lien against said land

under and by virtue of said judgments and attachments, and for costs of suit and that judgment be entered accordingly.

Done in open court at Wallace, Idaho, this 27th day of January, 1915.

WILLIAM W. WOODS,
District Judge.

Filed Jan. 27, 1915.

Service of the within Finding is hereby accepted and the receipt of a true and correct copy thereof acknowledged at Wallace, Idaho, this 27 day of Jan'y, 1915.

W. H. HANSON,
JAMES A. WAYNE,
Attorneys for Defendant.

(Title of Court and Cause.)

Judgment.

This cause having been heretofore by stipulation in writing between the respective parties, by and through their respective
25 attorneys, submitted to the Court on an agreed statement of facts, which stipulation and statement of facts are filed in this court in this cause, and it having been agreed in said stipulation, that the case should be determined on said statement of facts and the briefs of the respective parties; and said briefs having been filed with the Court, and the Court having duly considered the same and being fully advised both as to the law and the facts and having made and filed his findings of fact and conclusions of law, and it appearing that all the allegations of plaintiff's complaint are true and are sustained by the law and facts:

It is now therefore ordered, adjudged and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendant, and that said judgments and attachments described in the complaint of plaintiff, or either or any of them are not a lien on said premises described — said complaint as the Northeast Quarter (N. E. ¼) of the Northwest Quarter (N. W. ¼) Section Thirty-four (Sec. 34) Township Forty-eight North (T. 48 N.) Range Four (R. 4) East Boise Meridian, in Shoshone County, Idaho or on any part thereof; and it is hereby further ordered, adjudged and decreed that defendant be and he hereby is perpetually enjoined and restrained from in any manner selling or attempting to sell said land or any part thereof to satisfy said judgments or attachments or any of them, and said defendant is hereby barred
26 and foreclosed from asserting or claiming any lien or right of sale against said above described premises under and by virtue of said judgments or attachments or any or either of them, and it is hereby further ordered, adjudged and decreed that the plaintiff have and recover his costs herein taxed at Eleven and 40/100 Dollars.

Done in Open Court this 27th day of January, 1915.

WILLIAM W. WOODS,
District Judge.

Service of the within Judgment is hereby accepted and the receipt of a true and correct copy thereof acknowledged at Wallace, Idaho, this 27 day of Jan'y, 1915.

W. H. HANSON,
JAMES A. WAYNE,
Attorneys for Defendant.

Filed Jan. 27, 1915.

(Title of Court and Cause.)

Clerk's Certificate to Judgment Roll.

I, the Undersigned, Clerk of the District Court of the First Judicial District of said State, in and for said County, do hereby certify the foregoing to be a true copy of the Judgment entered in the above entitled action, and recorded in Judgment Book "E" of said Court on Page —. And I further certify that the foregoing papers, hereto annexed, constitute the Judgment Roll in said action.

Witness my hand and the Seal of the said District Court
27 this 27th day of January, 1915.

[SEAL.] JOHN P. SHEEHY, *Clerk,*
By C. J. CALLAHAN,
Deputy Clerk.

Filed Jan. 27th, 1915.

(Title of Court and Cause.)

Notice of Appeal.

To Charles F. Ruddy, Plaintiff, and to Messrs. Allen & Allen and A. H. Featherstone, Attorneys for plaintiff:

You and each of you will please take notice that the defendant in the above entitled cause hereby appeals to the Supreme Court of the State of Idaho from the judgment entered by the above entitled court in this cause on the 27th day of January, A. D. 1915, and from the whole thereof.

Dated at Wallace, Idaho, this 2nd day of February, A. D. 1915.

WALTER H. HANSON,
JAMES A. WAYNE,
Attorneys for Defendant.

Residence and Post Office Address: Wallace, Idaho.

Service of the within notice of appeal is hereby admitted this 2nd day of February, 1915.

ALLEN & ALLEN,
A. H. FEATHERSTONE,
Att'ys for Plaintiff.

Filed Feb. 2, 1915.

28 *Certificate in Re Undertaking on Appeal.*

STATE OF IDAHO,
County of Shoshone, ss:

I, John P. Sheehy, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do hereby certify that an undertaking on appeal in due form of law was filed in my office on the 2nd day of February, 1915, in the above entitled action.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at my office in the City of Wallace, Idaho, this 20th day of February, 1915.

[Seal District Court, First Judicial District, Shoshone County, State of Idaho.]

JOHN P. SHEEHY,
Clerk District Court.

(Title of Court and Cause.)

Præcipe.

To John P. Sheehy, Clerk:

You are hereby requested to prepare an original and four carbon typewritten copies of the following mentioned papers in the above entitled action to be used upon the appeal thereof, to-wit:

1. Complaint.
2. Demurrer to Complaint.
3. Journal entry over-ruling demurrer to complaint.

29 4. Answer.

5. Stipulation of counsel filed December 4, 1914, together with all exhibits attached thereto.
6. Findings of Fact and Conclusions of Law.
7. Judgment.
8. Notice of Appeal.
9. Undertaking on Appeal or Clerk's Certificate as to the filing of same.
10. This Præcipe.

Dated at Wallace, Idaho, this 2nd day of February, A. D. 1915.

WALTER H. HANSON,
JAMES A. WAYNE,
Attorneys for Defendant.

Residence and Post Office Address: Wallace, Idaho.
Filed Feb. 2, 1915.

30 STATE OF IDAHO,
County of Shoshone, ss:

I, John P. Sheehy, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Shoshone, do

hereby certify the foregoing to be a full, true and correct transcript (under the provisions of Section 4820-A, Revised Codes, of Chapter 117 of the 1911 Session Laws) of the Complaint; Demurrer to Complaint; Journal Entry over-ruling Demurrer to Complaint; Answer; Stipulation of counsel Filed December 4, 1914, together with all exhibits attached thereto; Findings of Fact and Conclusions of Law; Judgment; Clerk's Certificate to Judgment Roll; Notice of Appeal and Præcipe in the case of Charles F. Ruddy vs. Herman J. Rossi, all of which papers are now on file in my office in the above entitled action; that pages 1 to 29, inclusive, of the foregoing Transcript, include all papers prepared by me pursuant to a Præcipe therefor filed by appellant within five days after the filing of the Notice of Appeal; that the foregoing record, pages 1 to 29, inclusive, is compiled and bound under my direction as a true and correct Transcript of the proceedings therein contained.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office in Wallace, Idaho, this 23rd day of February, A. D. 1915.

[Seal District Court, First Judicial District, Shoshone County, State of Idaho.]

JOHN P. SHEEHY,
Clerk District Court.

31 It is hereby stipulated and agreed, by and between counsel for the respective parties to this action, that the foregoing transcript is a full, true and correct transcript on appeal from the judgment in the said action rendered and entered herein on the 27th day of January, A. D. 1915.

It is further stipulated and agreed that all questions of law and fact raised by the issues in this case, and upon which the judgment appealed from herein is based, may be considered on appeal of this action by the Supreme Court of the State of Idaho, and that the said transcript is sufficient for the purpose of presenting the said appeal to the said court for its decision upon all such questions.

ALLEN & ALLEN,
A. H. FEATHERSTONE,
Attorneys for Respondent.
WALTER H. HANSON,
JAMES A. WAYNE,
Attorneys for Appellant.

32 Service of the foregoing Transcript on Appeal is hereby accepted and the receipt of a true and correct copy thereof admitted at Wallace, Idaho, this 27th day of February, A. D. 1915

ALLEN & ALLEN,
A. H. FEATHERSTONE,
Attorneys for Respondent.

33 *Record Entries.*

CŒUR D'ALENE, IDAHO, December 8, 1915.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings (among others) were had, towit:

No. 2591.

CHARLES F. RUDDY, Respondent,
vs.
HERMAN J. ROSSI, Appellant.

This case having been heretofore set for hearing, now on this day the same was called, James A. Wayne and W. H. Hanson appearing for appellant, and Charles E. Miller and A. H. Featherstone appearing for respondent. After argument the cause was submitted and by the court ordered taken under advisement.

34 BOISE, IDAHO, January 15, 1916.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present: Hon. Isaac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings (among others) were had, towit:

No. 2591.

CHARLES F. RUDDY, Respondent,
vs.
HERMAN J. ROSSI, Appellant.

This cause having been heretofore heard, submitted and taken under advisement by the court, and the court having fully considered the same, now on this day the cause was again called, and the decision of the court is delivered by Justice Budge, to the effect that the judgment of the trial court be modified.

It is therefore considered, adjudged and decreed by the court that the judgment of the District Court of the First Judicial District in and for the county of Shoshone in the above entitled cause be and the same hereby is modified to the extent that the cause be remanded to the trial court with direction to enter decree that the judgment in the sum of $2,115.48, and costs amounting to

$19 [illegible] is a valid and subsisting lien upon the premises of respondent described in his complaint, and that the judgment as so modified be affirmed. Costs are awarded to appellant, in the sum of $87 [illegible].

35 Filed Jan. 15, 1916. I. W. Hart, Clerk.

In the Supreme Court of the State of Idaho.

Cœur d'Alene, December, 1915, Term.

CHARLES F. RUDDY, Respondent,
vs.
HERMAN J. ROSSI, Appellant.

Homestead Land—Exemption from Liability for Debts—Final Proof and Certificate—Patent—Sec. 2296, Rev. Stats., United States.

1. Under sec. 2296, Rev. Stat., U. S. (U. S. Comp. Stats. 1901, p. 1389), relating to homesteads, and providing that no lands acquired under such section shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, land so acquired is not liable for a debt contracted prior to the making of final proof and receiving final certificate entitling the entryman to a patent.

2. Held, that, under section 2296, supra, where a debt was contracted after the issuance of a final certificate of entry to defendant, but prior to his obtaining a patent, the land might lawfully be taken in satisfaction of the debt, since the patent, when issued, relates back to the date of the certificate.

36 Appeal from the District Court of the First Judicial District in and for Shoshone County, Hon. William W. Woods, Judge.

Action to Perpetually Enjoin the Sale of Land to Satisfy Judgment Liens upon Execution. Judgment for Plaintiff. Modified.

James A. Wayne, Walter H. Hanson, for appellant.
A. H. Featherstone, Chas. E. Miller, for respondent.

37 BUDGE, *J.*:

The respondent in this case filed a homestead entry on the northeast quarter of the northwest quarter, sec. 34, twp., 48, north, range 4, east, Boise Meridian, on August 6, 1903. Final proof was submitted by respondent in the local land office on October 4, 1909, and receiver's final receipt and certificate of entry acknowledging receipt of the purchase price of the land was issued November 12,

1909. The final patent to respondent for this land was not issued until August 26, 1912.

During the period between the date of the issuance of receiver's final receipt and the issuance of the patent itself, appellant advanced to respondent various sums of money. From the record it appears that there were also certain advances of money made to respondent prior to the issuance of the final receipt.

In September, 1912, appellant commenced suit in the district court of the First Judicial District against respondent, to recover the amount due the former, which amount was subsequently split into two separate suits, one upon promissory notes given by respondent to appellant and the other upon an open account. On May 8, 1914, judgment by confession for the sum of $931.87 was entered in favor of appellant in the action on the promissory notes; and on May 12, 1914, a jury in the suit on the open account rendered a verdict in favor of appellant for $2,115.48, and costs amounting to $19.05.

At the commencement of both of these actions attachments were levied upon the property heretofore described, and thereafter, in the month of June, 1914, executions were issued upon both these judgments and levy of the same was made upon the land in question.

Thereupon respondent commenced this action in the district
38 court for the purpose of removing the cloud of these judgments, attachments and executions from this land.

In his complaint respondent alleges that he obtained patent for this land on August 26, 1912, and ever since said date has held the title thereto. Appellant, by his answer, admits the issuance of the patent on the date mentioned, but denies that the same was issued by virtue of the compliance by respondent with the homestead laws of the United States, and denies that respondent now holds the title thereto. Respondent then avers the rendition of the two judgments heretofore mentioned, and this allegation is admitted by the answer, as is also the allegation of the complaint that attachments were levied in these two suits upon the land of respondent. Respondent then alleges that each and every item of indebtedness going to make up the two judgments in question was contracted by him prior to the date of the issuance of the patent to said land; and that said land is, by the provisions of sec. 2296, Rev. Stats. of the United States, exempt from liability for the satisfaction of said judgment.

Sec. 2296, supra, provides: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

This action was submitted to the trial court on a stipulation of facts, upon which judgment was rendered in favor of respondent, from which judgment this appeal is prosecuted.

The only question decided by the trial court in this case was, Can land procured from the United States under the provisions of the homestead law be sold on execution for the payment of a debt contracted after final proof has been made, but before the issuance

of the patent therefor? And this is the only question before us.

39 Respondent claims that the property was exempt from levy and sale by virtue of section 2296, supra, while appellant insists that the property is subject to levy and sale for debts contracted subsequent to the issuance of the final receipt, though prior to the issuance of the patent.

It is stipulated by counsel in paragraph five of their stipulation of facts that the notes on which the judgment of $931.87, including costs, was rendered, were all dated and the debts incurred prior to the date of the issuance of the receiver's receipt, to wit, prior to November 12, 1909. Counsel, by their own stipulation, have, therefore, eliminated from our consideration that judgment, by reason of the fact that it is conceded the indebtedness on which it was founded was incurred prior to the issuance of the final receipt. The trial court properly held that that judgment was not a cloud upon respondent's title to the land above described, and that the land was not subject to levy and sale under an execution thereon.

No indebtedness incurred prior to November 12, 1909, could become a lien against the land of respondent, having been contracted prior to the issuance of the final receipt. (Leonard v. Ross, 23 Kan., 292; Kansas Lumber Co. v. Jones, 32 Kan., 195, 4 Pac., 74.)

It is further stipulated by counsel that the items which make up the judgment for $2,115.48, all accrued between September 22, 1909, and August 9, 1912; while the bill of particulars shows that the first item of indebtedness upon which this judgment was based, accrued on January 3, 1910, and the last on August 9, 1912. These facts are, however, easily reconcilable, as the stipulation of facts contains a general statement of the dates between which the indebtedness accrued, and the bill of particulars shows the specific

40 dates of the items of indebtedness. It may therefore, be properly conceded that all of the items of indebtedness on which this judgment was based were incurred subsequent to the date of the issuance of final receipt, but prior to the issuance of the patent to this land.

It is contended by respondent's counsel that lands to which title is acquired under the homestead laws of the United States are not liable for any debts of the entryman prior to the actual issuance of the patent itself. This contention is based on section 2296, U. S. Rev. Stats., heretofore quoted, and is supported by a number of decisions rendered by courts of recognized eminence. The state supreme courts before which this question has been brought are not, however, unanimous in opinion; some of them holding to the literal, technical construction of section 2296—that lands to which title is acquired under the homestead laws of the United States are not liable for any debts of the entryman prior to the actual issuance of the patent itself; while others equally reputable have held that such lands are liable for debts of the entryman contracted between the date of the issuance of the receiver's final receipt or certificate and the date of the issuance of the patent.

One of the early cases construing this section of the homestead law is found in Leonard v. Ross, 23 Kan., 292, in which opinion Justice Brewer (afterwards one of the justices of the Supreme Court of the United States) fully concurred. The question involved in that case was whether a piece of land owned by Ross was exempt from execution held by Leonard, sheriff of Harvey county, Kansas. The facts of that case were, that on May 3, 1873, Ross entered his land under the homestead act of Congress. On October 25, 1873,
41 he became surety on the official bond of Monger as treasurer of Harvey county. On May 19, 1874, he made his final proof, and paid his money for his land under the eighth section of said homestead act. At sometime or times between November 5, 1872, and October 12, 1874, Monger and his sureties became liable on said official bond for breaches thereof. On December 15, 1874, Ross's patent for his land was issued to him. On April 24, 1875, an action was brought by the commissioners of Harvey county against Monger and his sureties for said breaches of the bond. On December 27 became subject to execution for debts subsequent to May 19, 1874, Whereupon an execution was ordered and levied upon said land to satisfy said judgment. The question was, When did said land become subject to execution for debts? The court held that the land became subject to execution for debts subsequent to May 19, 1874, at the time when Ross made his final proof and payment, and based its conclusion upon the theory that Ross was entitled to his patent on May 19, 1874, and therefore his right must be determined as though the patent had in fact been issued on that date. That court said:

"The failure of the officers to issue the patent at the time that it ought to be issued, does not affect the rights of any person. The property becomes the purchaser's at the time he pays for it, with the bare, naked legal title only remaining in the government. After Ross paid his money, he did not any longer hold his land under the provisions of the congressional homestead act. When he paid for his land, he thereby took it out of the further operation of said homestead act; * * *. That provision of said homestead act which refers 'to the issuing of the patent' has reference to
42 that period of time when the patent ought to be issued, and not to the mere clerical work of issuing it."

That the issuance of the patent is purely a ministerial act, has been practically the universal holding of the courts. (Blachley v. Coles, 6 Colo., 350; Poire v. Wells, Id., 406; Steel v. Smelting Co., 106 U. S. 447; Heydenfeldt v. Gold etc., Co., 93 U. S. 634.)

When the final receipt or certificate is issued to the homestead settler, the land becomes liable for the payment of debts contracted subsequent thereto, even though prior to the issuance of the patent. (Hobb v. J. I. Case Thresh. Mach. Co., 135 Pac., 395; Struby-Estabrook Merc., Co., v. Davis, 31 Pac., 495; Budd v. Gallier, 89 Pac., 638; Johnson v. Borin, 54 Pac., 804; Shelby v. Siegler, 98 Pac., 989; Weare v. Johnson, 38 Pac., 374.)

One of the principal cases relied upon by counsel for respondent to support their position is the case of Barnard v. Boller, 105 Cal.,

214, 38 Pac., 728. That court places an exactly opposite construction upon section 2296 of the homestead act, supra, to that of the supreme courts of Oklahoma, Colorado and Kansas, and holds in effect that a homestead acquired pursuant to this homestead act is not liable to the satisfaction of any debt contracted prior to the issuance of the patent, and that no lands thus acquired can be taken in execution for any debt incurred after the issuance of a receiver's receipt entitling the homestead claimant to a patent and before the issuance of the patent. In this case the court said:

"The date of issuing the patent is made the point of time which divides the liability and nonliability of the land. It is this event or act which determines the question of liability, and not the
43 title or the question of relation as applicable to the holder thereof which must be taken as the criterion.

"Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz., 'to the issuing of the patent therefor.'

"Had the statute provided that homesteads should not be liable for the debts of the patentees thereof contracted during their natural lives, or for ten years after the issuance of the patent, its constitutionality being conceded, the end of the life of the patentee or the expiration of the ten years would afford the test by which to measure the liability, and, in such a case, it is believed no just claim of liability could be maintained on account of debts contracted before the expiration of the time specified or event mentioned upon the ground that the patentee had previously held the title, legal or equitable.

"The provision of section 2296 is regarded as being equally explicit with the case supposed."

The supreme court of Oklahoma in the case of Flanagan v. Forsythe, 50 Pac., 152, in discussing the opinion of the supreme court of California just referred to, and in answer to the argument advanced, which it quotes at length, among other things, says: "We cannot agree with the reasoning just quoted, but believe it to be faulty in many respects. It does not give to the congressional enactment a reasonable interpretation, but assumes that that body intended thereby to arbitrarily fix the date of the performance of a mere clerical duty as the time when homesteads might become liable for debts contracted by those who had entered them, instead of the time at which such entry men had performed all of the re-
44 quirements of the law on their part entitling them to such patents. The officers of the government whose duty it is to issue these patents might, on account of the accumulation of work, delay the issuance thereof for a period of five or even ten years after the entry men had become entitled thereto; and yet, under the interpretation given the statute in question in the California case, the holder of the final or patent receipt could rest assured that the tract of land, of which he had, to all intents and purposes, become the owner, could not be held liable for any debts which he might contract; * * *. When an entry man complies with all of the requirements of the law, and acquires such title to the tract of land entered as a homestead as to enable him to dispose of same at will,

and to require him to pay taxes thereon, we can see no reason why the exemption provided in said section of the Revised Statutes should still be held to apply thereto."

Counsel for respondent also cite and rely upon the case of Wallowa Nat. Bank v. Riley, 45 Pac., 766, wherein the court said: "So far as the question of title is concerned, this question may be conceded; but the vice of the position, as applied to the case before us, lies in the fact that we are not dealing with title, but with the question of exemption under a valid statute which declares, in plain and direct terms, that the land granted thereby shall not be liable for debts contracted prior to the happening of a specific event." Yet it is conceded by the great weight of authority that when the homesteader has complied with all of the provisions of the law for the disposition of public lands; has paid the purchase price and received his final receipt or certificate therefor; has done all that is required to
45 vest the complete title in him, he thereby acquires a title of which he cannot be deprived by the government except for fraud or mistake. When he has complied with these provisions and made final proof, he may sell the land thus acquired, at his pleasure; he may create, by his voluntary act, a lien upon the same; and he may maintain an action of ejectment to recover its possession. The land is then liable to assessment for taxes and can be sold to satisfy a tax lien; and there remains in the government only what by some authorities has been defined to be the "naked legal title." There is nothing remaining for the homestead entryman to do but wait for the final issuance of the patent, which, when issued, simply furnishes evidence of ownership, and relates back to the date of the issuance of the final receipt or certificate.

We are, therefore, unable to recognize the doctrine so earnestly contended for by counsel for respondent and supported by the case of Wallowa Nat. Bank v. Riley, supra, which is the extension of exemption of a homestead entryman's land from execution beyond the issuance of the final receipt, when he has by a full compliance with the provisions of the congressional homestead act taken himself out of the further operation thereof. In other words, when the United States has parted with the title to the land, and the same has vested in the homestead entryman, the authority by which congress may extend the provisions of exemption to his land after he has title and before the issuance of patent, thereby dealing with the question of exemption which, in our opinion, is exclusively within the jurisdiction of the state and which is a personal right of the debtor that he may waive or claim under the statutes of the respective states, is not manifest to us. The application of this doctrine would result in defeating the just claims of creditors,
46 and it is a principle with which we are not in accord.

We are of the opinion that that provision of section 2296, supra, which refers to the issuance of the patent has reference to the period of time when the patent ought to be issued and not to the mere clerical work of issuing it, and that said section no longer applies to homesteads after final proof has been made and receiver's final certificate has been issued therefor. This rule appears to us to

be supported not only by reason but also by the weight of authority.

From the foregoing conclusions it follows that the trial court did not err in holding that the judgment for $931.87 in favor of appellant was not a lien or a cloud upon the land described in respondent's complaint, but that the court did err in holding that the judgment in the sum of $2,115.48 was not a lien upon said land.

We therefore affirm the judgment of the trial court so far as it holds that the judgment for $931.87 is not a lien or cloud upon the title to the land described in respondent's complaint; and the cause is remanded to the trial court with direction to modify its judgment to the extent that the judgment in the sum of $2,115.48, and costs amounting to $19.05, is a valid and subsisting lien upon the premises of respondent described in his complaint. Costs are awarded to appellant.

Morgan, J., concurring.

SULLIVAN, *C. J.* (Dissenting):

I am unable to concur in the conclusion reached by the majority of the court. The main question for determination in this
47 case is whether the land acquired by a homesteader under the homestead laws of the United States is liable to seizure and sale for the satisfaction of a debt contracted after final proof has been made by the homesteader and before patent issues.

The decision of this question depends upon the proper construction of the provisions of sec. 2296, Rev. Stats. of the United States, which is as follows:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

The chapter of the United States statutes in which said section is found includes the provisions enacted by Congress for the entry of homesteads on the public domain of the United States. By the federal constitution the Congress of the United States is expressly vested with the power of making all needful rules and regulations respecting the public domain and may dispose of the public lands of the United States on such terms and conditions as in its judgment it may deem advisable; and one of the rules and regulations provided by Congress is that contained in said section 2296.

It seems to me that said section is so plain, clear, distinct and unambiguous in its language as not to require any construction whatever. The conditions and limitations placed upon the disposition of such lands must be derived from the language Congress has used in fixing or limiting such conditions provided such language is plain and unambiguous. Courts cannot legislate condi-
48 tions in or out of the grants which Congress has made of the public lands. It seems to me there is no room for judicial construction of said section.

That section prescribes one of the conditions upon which such lands should be conveyed to the homesteader, namely, upon the condition that the lands acquired under its provisions should not be liable for any debts contracted prior to the issuing of the patent

therefor. It thus clearly and distinctly fixes the exact time at which exemptions shall cease and the conditions become ineffective, and that is when the patent shall issue.

The majority of the court construes the word "patent" in said section to mean "final certificate." Certainly if Congress had intended that the exemption there provided should cease when the final certificate or final receipt was issued, it would have used the word "final receipt" or "final certificate" instead of the word "patent." Is it too much to assume that Congress was familiar with the law it had enacted for the disposition of the public lands; that it clearly understood the distinction between a final certificate and a patent?

It seems to me the majority has refused to give to the language used in said section its plain, natural and ordinary meaning, but has construed the word "patent" to mean "final certificate."

The opinion in the case of Barnard v. Boller (Cal.), 38 Pac. 728, contains my views upon the question under consideration, and the proper construction of the provisions of said sec. 2296. That case refutes the application of the doctrine of relation in such a case as the one at bar, and holds that under the provisions of said section the condition or circumstance of the equitable title is not made the criterion of liability for antecedent debts. That section
49 clearly provides that the land shall not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The date of the issuing of the patent is made the point of time which divides the liability from the non-liability of the land. It is this event or act which determines the question of liability and not the title or the question of relation as applicable to the holder thereof which must be taken as a criterion, and in the last cited case it is stated: "Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz., 'to the issuing of the patent therefor.'"

The majority quotes Flanagan v. Forsythe (Okla.), 50 Pac. 152. I am unable to agree with the reasoning in that case and believe it to be faulty in many respects and that it utterly fails to properly construe said sec. 2296. In that case Justice Tarsney filed a dissenting opinion which, in my view of the matter, utterly demolishes the arguments and reasoning used by the majority in that case.

The Supreme Courts of Kansas, Oklahoma and Colorado hold that the homestead is liable for the debts incurred after the issuance of final receipt and before the issuance of the patent, while Arizona, Arkansas, California, Minnesota, Missouri, Nebraska, Oregon, South Dakota, Washington and Wisconsin all hold that said sec. 2296 means just what it says and that the homestead entry is not liable for the payment of the debts of the homesteader contracted prior to the issuance of the patent.

The United States Court has construed said sec. 2296 and in In re Cohn, 171 Fed. 570, referring to said section, the court said: "It is the issuance of the patent which fixes the time when the

property shall become liable to subsequent debts of the home-
50 steader."

In Grames v. Consolidated Timber Co., 215 Fed. 785, the court, speaking through Wolverton, District Judge, after quoting said sec. 2296, said:

"This provision has received a literal construction, and comprises any debt accruing or existing prior to the date of the issuance of the patent, and, although in some cases affecting the title to the homestead, where the issuance has relation back to the issuance of the final certificate, the clause can bear no such interpretation, as it applies to the exemption designed for the benefit of the homesteader."

See also Seymour v. Sanders, decided by Dillon, Circuit Judge, Case No. 12,690, Federal Cases.

Not a single federal case has been called to my attention where the construction of said sec. 2296 was involved, where the federal courts have not held that the issuance of the patent is the date fixed when the land of the homesteader shall become liable for his subsequent debts, and not one of them holds that the land becomes liable for such debts upon the issuance of the receiver's final certificate.

The judgment of the trial court ought to be affirmed.

51 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff and Respondent,
vs.
HERMAN J. ROSSI, Defendant and Appellant.

Petition for Rehearing.

The petition of Charles F. Ruddy, the respondent above named, for a rehearing in the above entitled action, a decision having been rendered against him, by this Court, on January 15th, 1916, respectfully shows as follows:

For that the said decision is contrary to law and contrary to the facts as stipulated by the parties.

Argument, Points and Authorities.

Ordinarily, where only a question of law is involved, we would not apply for a rehearing because we would assume that the Court has given the issues such full deliberation as to preclude any idea of a change in the judicial mind. But where, as we believe in this case, there has been a palpable oversight of the material facts, it would not be fair to the Court to fail to call attention to them.

The decision in this case as we read the majority opinion, follows the cases of Leonard v. Ross, 23 Kan. 292, rendered while Judge Brewer, afterwards an associate Justice of the Supreme Court of the United States, (to which the writer of the opinion calls attention), was a member of the Kansas Court, and the Oklahoma

case of Flanagan v. Forsyth, 50 Pac. 152; no other cases are quoted from probably because they reached their conclusions by invoking the doctrine of relation, to which, apparently this Court does not subscribe.

The decision here is based squarely on construing the
52 word "patent" in the Federal Statute as meaning "receiver's receipt," and substituting the latter for the former.

An examination of the various cases cited in the briefs and in the majority opinion, will show that no proceedings were had in the land office in those cases after the issuance of the receiver's receipt, other than the granting and delivery of the patent. The decisions in all of these cases rest upon the theory that the entryman was clothed with the full equitable title. The receiver's receipt did not invest the entryman with title. It was simply evidence of certain facts, and if nothing to the contrary appeared to contradict or qualify them, it raised the presumption that the entry had gone to patent, leaving nothing more to be done than the clerical act of issuing, hence the equitable title.

The final proofs are received and taken by the local officers of the land office. They can hear the evidence, receive the fees which go to them and not to the Government, no purchase money being required for a homestead, and they can recommend the issuance of a patent; but the order that the entry shall go to patent must emanate either from the Land Commissioner or the Secretary of the Interior, as the acts of Congress provide. The jurisdiction of the general land office does not cease until the patent is executed and delivered. On this point we cite the following:

Decisions of the Department of the Interior.

The approval of final proof and issuance of certificates thereon by the local office, in no way limits the authority and jurisdiction of the Department over the entry. In re Edward Wiswell, 6 D. of I. Dec. 265.

Prior to the issuance of patent, the land department may re-open a case to correct an error in the decision thereof and readjudicate the same after due notice to the parties. N. P. R. R. Co. v. Coffman, 24 D. of I. Dec. 280.

53 Until patent has issued the land department has jurisdiction to inquire and determine whether or not a claimant for lands under the public land laws has complied therewith; and, if entry has been made, to inquire and determine whether or not it was properly allowed, and if found not to have been so allowed, it is the duty of said department to vacate and cancel such entry. Reed v. Bowron, 32 D. of I. Dec. 383.

Until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department and the Secretary of the Interior, as the head of that depar't, may take such action with reference thereto as to him seems in accordance with law.

A controversy involving a claim to public lands is never finally

settled until it receives such adjudication as removes the land involved from the jurisdiction of the land department. In re State of Louisiana, 33 D. of I. Dec. 13.

It is within the jurisdiction and power, and in the duty of the land department to inquire into and determine questions brought to its attention touching the legality or validity of claims asserted under the public land laws, at any time prior to the issuance of patent. In re F. A. Hyde & Co., 33 D. of I. Dec. 639.

It is urged that even if the departmental regulations at the time of the filing of the selections in question, required that proof of the vacancy or non-occupancy of the selected land should accompany the selections, the acceptance of these selections by the local land officers in the absence of such proof was a waiver of the requirement and that such waiver is binding on the government.

The proposition is unsound. If followed as a rule of law the Secretary of the Interior would be practically shorn of the supervisory power and authority over the disposal of the public lands vested in him by Sections 441, 453 and 2478 of the Revised Statutes,

54 The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office and by the Secretary of the Interior, as the proper administration of the law or the demands of justice may require. (Orchard v. Alexander, 157 U. S. 373; Knight v. Land Association, 142 U. S. 161; Parsons v. Venzke, 164 U. S. 89.) Kern Oil Co. v. Clarks, 31 Dec. of D. of I. p. 302.

And it was held by the Federal Supreme Court in the case of Michigan Land & Lumber Co. v. Rust (168 U. S. 589, 592-3) as follows:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother v. Lucas, 12 Pet. 410, 454; Grignon's Lessee v. Astor, 2 How. 319; Choteau v. Eckhart, 2 How. 344, 372; Glasgow v. Hortiz, 1 Black, 595; Langdeau v. Hanes, 21 Wall 521; Ryan v. Carter, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 2449; Frasher v. O'Connor, 115 U. S. 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent. Bagnell v. Broderick, 13 Pet. 436, 450; and while so remaining the grant is in process of administration and the jurisdiction of the land department is not lost * * * In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

It will thus clearly appear that the entryman is not clothed with the full and absolute equitable title until the land Commissioner

or the Secretary of the Interior, he having the proceedings on
55 appeal, as in this case, makes an order directing the issuance of the patent.

All of these potent matters appear fully in Exhibit "A" of the record, apparently overlooked by the majority of this Court in the decision, and they show conclusively and beyond all dispute, that the respondent was not invested with the full and absolute equitable title, within the meaning of the cases cited and the majority opinion itself until May 3rd, 1912.

Exhibit "A" discloses the following facts: That Ruddy made final proof before the local land officers on October 4th, 1909, and was awarded the receiver's certificate on November 12th, 1909; that within the year prescribed by law, to-wit, on July 8th, 1910, Herman G. Bergman initiated a contest by affidavit against Ruddy's entry which was entertained by the land Department; that three other persons, who had formerly contested this entry were, on motion, admitted as contestants with Bergman; that a hearing was had, witnesses examined on behalf of both parties and the receiver (the register, the other local officer, being disqualified) rendered an adverse decision on the contest, holding that "The evidence clearly shows the prior right of Charles F. Ruddy, the contestee, to the land in controversy by reason of prior settlement and improvements thereon," thus showing that the right to the patent was litigated on every matterial fact long after final proof had been made; that Bergman then took an appeal to the Land Commissioner from the decision of the local office who affirmed the latter's decision; that, unsuccessful in his contest, Bergman then took a further appeal to the Secretary of the Interior, who on May 3rd, 1912, two years, seven months and twenty-one days subsequent to the date of the receiver's receipt, after considering Ruddy's entry on the entire merits, rendered his decision in writing formally awarding this homestead to Ruddy; and that this decision concludes as follows:

"The decision appealed from is affirmed and the entry will pass to patent."

Exhibit "A" shows, beyond cavil, that Ruddy was obliged to make proofs of settlement, cultivation, improvements, resi-
56 dence and character of the land, long after the receiver's receipt was issued to him, and that the matter was pending on the full merits until the final decision of the Secretary. Leonard v. Ross, applied to the real facts in this case, is an authority in our favor; Judge Valentine says:

"The failure of the officers to issue the patent at the time that it ought to be does not affect the rights of any person."

It was not because of the failure or neglect of the officers that the patent was not issued earlier, but, it was because the clerical act was not authorized until the order of May 3rd, 1912, and the patent could not issue before. It is as plain as a pike staff that the respondent was not clothed with the full and absolute equitable title until the last mentioned date.

As the patent ought not to have been issued until May 3rd, 1912,

even under the theory of the majority opinion that Congress did not mean what it said in the Act in question, an examination of the bill of particulars will show that only two items, Merriam & Merriam, Alexandria, $15.00, August 2, 1912, and Home of N. Y. ins. No. 906, $16.80, a total of $31.80, were incurred after May 3, 1912 And these dates are those of entry, most likely, as it appears that the parties ceased to deal, regularly with each other about August 31st, 1911, and, if the law is to be maintained, as announced by the majority, the judgment of this Court should be modified and the amount of $31.80 substituted for $2125.00 and the costs should not be taxed against respondent.

We submit further, most seriously and earnestly, that the facts in this case and an analysis of the decisions, demonstrate the infallibility of the opinion of the Chief Justice in his construction of the Federal statute. The patent is not earned until the government is divested of the full and absolute equitable title. The time at which this metamorphosis takes place is when the Commissioner, or the Secretary, makes the order that the entry shall go to patent.

57 This may be upon the issuance of the receiver's receipt, or, at some other time, (as in this case, long after), because of contest proceedings.

The time when the patent "ought to be issued", is thus uncertain and the date would not necessarily be the same in any two cases. The date of the issuance of the patent is an absolutely certain one and was it not because of its certainty and universality that Congress adopted it? Do not the very facts in this case demand the literal construction?

Again, the Federal Statute is plain in its terms. It is without ambiguity or uncertainty. There is nothing to indicate that Congress did not know the difference between a patent and a receiver's receipt, and the words used are the plainest of English as ordinarily understood. None of the conditions requiring judicial interpretation, of which we have ever heard or read, are present.

What the highest tribunal of the land would say about this statute has been recently foreshadowed in a unanimous opinion.

In the case of MacKenzie v. Hare, decided by the Supreme Court of the United States on December 6th, 1915, reported In Vol. 36, No. 4, Page 106, of the Supreme Court Reporter, Justice McKenna very clearly expressed his views upon reading something into Act of Congress which is not there, and it is peculiarly applicable on this occasion. The facts are briefly stated thus:

"The plaintiff was born and ever since has resided in the State of California. On August 14, 1909, being then a resident and citizen of this State and of the United States, she was lawfully married to Gordon MacKenzie, a native and subject of the Kingdom of Great Britain. He has resided in California prior to that time, still resides there, and it is his intention to make this State his permanent residence. He has not become naturalized as a citizen of the United States and it does not appear that he intends to do so. Ever since their marriage the plaintiff and her husband have lived together as husband and wife. On January 22, 1913, she applied to the defend-

ants to be registered as a voter. She was then over the age of twenty-one years and had resided in San Francisco for more than ninety days. Registration was refused to her on the ground that, by reason of her marriage to Gordon MacKenzie, a subject of Great Britain, she thereupon took the nationality of her husband and ceased to be a citizen of the United States."

58 "Plaintiff in error claims a right as a voter of the State under its Constitution and the Constitution of the United States."

"The Constitution of the State gives the privilege of suffrage to 'every native citizen of the United States', and it is contended that under the Constitution of the United States, every person born in the United States is a citizen thereof. The latter must be conceded, and if plaintiff has not lost her citizenship by her marriage, she has the qualification of a voter prescribed by the Constitution of the State of California. The question then is, 'did she cease to be a citizen by her marriage?' "

"On March 2, 1907, that is, prior to the marriage of plaintiff in error, Congress enacted a statute, the third Section of which provides:

"That and American Woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year, with a Consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein'.

34 Stat. at L. 1228, chap. 2534, Comp. Stat. 1913, 3960.

"Plaintiff contends that 'such legislation, if intended to apply to her, is beyond the authority of Congress.'

"Questions of construction and power are, therefore, presented. Upon the construction of the Act it is urged that it was not the intention to deprive an American-born woman, remaining within the jurisdiction of the United States, of her citizenship by reason of her marriage to a resident foreigner. The contention is attempted to be based upon the history of the Act and upon the report of the committee, upon which, it is said, the legislation was enacted. Both history and report show, it is asserted, 'that the intention of Congress was solely to legislate concerning the status of citizens abroad and the questions arising by reason thereof.' "

"Does the act invite or permit such assistance? Its declaration is general. 'That any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or within one year registering as an American citizen. The Act is therefore explicit and circumstantial. It would transcend judicial power to in-

sert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accomodate."

In the case of Kan. Pac. R. R. vs. Prescott, 16 Wallace 603, Justice Miller, speaking for the Federal Supreme Court defines
59 what a full equitable title is, as follows:

"While we recognize the doctrine heretofore laid down by this Court, that lands sold by the United States may be taxed before they have parted with the legal title by assuming a patent, it is to be understood as applicable to cases where the right to the patent is complete, and the equitable title is fully vested in the party without anything more to be paid, or any act to be done, going to the foundation of his right."

In the case at bar there was no purchase price in money. The consideration was actual residence for the period of five years, use, cultivation and improvments, compliance with which Ruddy must establish, judicially, by proofs. The determination of his full and absolute equitable title was not made until May 3rd, 1912, and, under Justice Miller's decision, just referred to, the land could not be taxed until that date.

As showing Justice Brewer's position on some of the questions involved here, we append a copy of a portion of his opinion in the case of Hussenan v. Durham, 165 U. S. 144, along the line of the argument of Justice Miller already referred to. On the doctrine of relation, he is found to be squarely in accord with that advanced in respondent's brief.

"Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backwards than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1859, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day. In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertence or fraud a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere. Thus, in Reynolds v. Plymouth County, 55 Iowa, 90, it appeared that certain forged and counterfeit agricultural college scrip was located upon a tract of land, and that, after the issue of the certificate of location and before any patent, state taxes were assessed and levied thereon. Thereafter the forgery was discovered, the locator substituted genuine scrip or money, and a patent was issued. The court held that the taxes thus assessed and levied during the interval between the original illegal entry and location and the subsequent substitution of genuine scrip or money were invalid, saying:

'In order to protect a title, or to attain the ends of justice, the

Court will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands.'

60 A similar doctrine was announced in Calder v. Keegan, 30 Wis. 126.

See also Gibson v. Chouteau, 80 U. S. 92,* in which this Court, on page 101 (537), said: 'The error of the learned Court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder.'"

We respectfully submit that the decision in this case, handed down by the majority, is erroneoues and is the result of a misconception of the facts of this particular controversy; or that at least, the facts now called to the attention of the Court, having received only scant notice in the briefs and on the oral argument and, the entire premises considered, a rehearing should be granted, that this important phase, may have the most thorough investigation and thoughtful consideration.

A. H. FEATHERSTONE,
CHARLES E. MILLER,
Counsel for Respondent.

Endorsed: Filed January 29, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

61 BOISE, IDAHO, February 10, 1916.

SUPREME COURT,
State of Idaho, ss:

Court met pursuant to adjournment.

Present:—Hon. Issac N. Sullivan, Chief Justice; Hon. Alfred Budge, Justice; Hon. Wm. M. Morgan, Justice, and the officers of the court, when the following proceedings (among others) were had, towit:

No. 2591.

CHARLES F. RUDDY, Respondent,
vs.
HERMAN J. ROSSI, Appellant.

A petition for rehearing having been heretofore filed on behalf of respondent in this cause, and the court having fully considered the same, now on this day the cause was again called and it was ordered that said petition be and the same hereby is denied.

62 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff and Respondent,
vs.
HERMAN J. ROSSI, Defendant and Appellant.

Petition for Writ of Error to the Supreme Court of the United States.

To the Honorable I. N. Sullivan, Chief Justice of the Supreme Court of the State of Idaho:

Comes, now, Charles F. Ruddy, the above named plaintiff and respondent, by A. H. Featherstone and Charles E. Miller, his attorneys, and complains and alleges that he is a citizen of the United States of America; that, in the above entitled matter, on the fifteenth day of January A. D. 1916, a final judgment was rendered against your petitioner by the Supreme Court of the State of Idaho, that being the highest court of law or equity in the said State of Idaho, wherein it was adjudged that the provisions of Section 2296 of the Revised Statutes of the United States, which provided that no lands acquired under the Federal statutes, relating to homesteads, should in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, apply and refer only to debts contracted prior to the issuing of the receiver's final receipt to the homestead entryman, and that
63 said homestead is exempt from liability only from such debts, without reference to the date of the issuing of the patent.

It was also adjudged by said Supreme Court, by its said final judgment in the above entitled matter, in construing the said Federal statute as to the homestead exemption therein provided for, that the Congress of the United States, in fixing the time up to which the Federal homestead should not be liable for the debts of the entryman, by said Act, meant the date when said patent ought to issue and not the actual date of the issuance of the same, all of which appears in the record, opinion and final judgment of said Supreme Court, modifying the judgment of the trial court, and discharging the injunction awarded to your petitioner, by said trial court, (which held that your petitioner's homestead was not liable for any debt contracted prior to the actual date of the issuance of the patent, the date of the issuance of the receiver's final receipt being immaterial), and giving and rendering judgment against your petitioner for the costs of said appeal, whereby manifest error has happened to the great damage of your petitioner.

Wherefore your petitioner prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho and the judges thereof, to the end that the record in said matter may be removed into the Supreme Court of the United States, and the error complained of by your petitioner may be examined and corrected and said judgment reversed and the judgment of the trial court, to-wit, the District Court of the First

Judicial District of the State of Idaho, in and for the County of Shoshone.

And your petitioner will ever pray.

CHARLES F. RUDDY,
By A. H. FEATHERSTONE,
CHARLES E. MILLER,
His Attorneys.

63½ [Endorsed:] No. 2591. In the Supreme Court of the State of Idaho. Charles F. Ruddy, Plaintiff & Respondent, vs. Herman J. Rossi, Defendant & Appellant. Petition for Writ of Error. A. H. Featherstone & C. E. Miller, Attorneys for Respondent. Filed Feb. 10, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

64 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff in Error,
vs.
HERMAN J. ROSSI, Defendant in Error.

Assignment of Errors.

Comes, now, the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Idaho, in the above entitled matter, there is manifest error in this, towit:

First. In the application and construction of Section 2296 of the Revised Statutes of the United States, relating to homesteads, providing that "No lands acquired under the provisions of this Chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor," contrary to the literal terms of the same, and in adjudging and deciding that said statute exempts the lands of the homesteader from liability, only, for debts which antedate the issuing of the final receiver's certificate.

Second. In adjudging and deciding that Congress, in the enactment of said statute, meant to exempt the lands of the homesteader from liability only for debts contracted prior to the issuing of the receiver's final certificate, without reference to the date of the patent subsequently issued.

Third. In adjudging and deciding that the plaintiff in error became clothed with the absolute equitable title to the homestead lands in question upon the issuance to him of the receiver's final certificate.

65 Fourth. That the said judgment and decision of the court, that the said homestead lands became wholly subject to the laws of the State of Idaho, relating to taxation and exemption, upon the issuance of the receiver's final certificate to plaintiff in error, is repugnant to Section 3 of Article IV of the Federal Constitution which invests Congress with the exclusive power of dis-

posing of and making all needful rules and regulations respecting the public domain.

Fifth. That the final judgment and decision herein was given for the defendant in error, whereas by the law of the land the said judgment and decision should have been given for the plaintiff in error and against the defendant in error.

A. H. FEATHERSTONE,
CHARLES E. MILLER,
Counsel for Plaintiff in Error.

Endorsed: Filed Feb. 10, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

66 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff and Respondent,
vs.
HERMAN J. ROSSI, Defendant and Appellant.

Order Allowing Writ of Error.

The above entit'ed matter coming on to be heard upon the petition of Charles F. Ruddy, the plaintiff and respondent therein, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Idaho, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States the questions presented by the record in said matter.

It is ordered that a writ of error be, and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be, and the same is, hereby approved.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court of the State of Idaho.

Endorsed: Filed Feb. 10, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

67 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff and Respondent,
vs.
HERMAN J. ROSSI, Defendant and Appellant.

Bond on Writ of Error.

Know all men by these presents; that we, Charles F. Ruddy, as principal and Fidelity and Deposit Company of Maryland, as

sureties, are held and firmly bound unto Herman J. Rossi, in the sum of One Thousand ($1000.00) Dollars, to be paid to the said obligee, his successors, representatives and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of February A. D. 1916.

Whereas, the above named plaintiff in error hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Idaho.

Now, therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute his said writ of error to effect and answer all costs and damgaes if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

CHARLES F. RUDDY,
By A. H. FEATHERSTONE,
His Attorney in Fact.

[SEAL.]

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By A. H. FEATHERSTONE,
Its Attorney in Fact.

P. V. WHELAN, *Agent.*

68 STATE OF IDAHO,
County of Shoshone, ss:

On this 3rd day of February A. D. 1916, before me personally appeared A. M. Featherstone, to me known to be the person described in and who executed the foregoing bond and acknowledged to me that he was the duly appointed and constituted attorney in fact of the said Charles F. Ruddy, and that he executed the same as such for the uses and purposes in the said bond set forth and expressed.

Witness my hand and official seal 3rd day of February A. D. 1916.

[SEAL.]

L. M. SOMMERS,
A Notary Public for the State of Idaho,
Residing at Wallace, in said County.

69 STATE OF IDAHO,
County of Shoshone, ss:

A. H. Featherstone and P. V. Whelan being severally duly sworn, each on his oath deposes and says:

That said A. H. Featherstone is the duly appointed, qualified and acting Attorney in Fact and the said P. V. Whelan is the duly authorized and appointed agent of the Fidelity and Deposit Company of Maryland, the surety named in the within instrument, and as such Attorney in Fact and Agent they are duly authorized by the said Fidelity & Deposit Company of Maryland to sign said obliga-

tion for and on its behalf; that said Fidelity & Deposit Company of Maryland has complied with all the laws of the State of Idaho relating to surety corporations and is entitled to do business in the State of Idaho and to execute the foregoing obligation as will appear by the certificate on file in the office of the County Recorder of Shoshone County, State of Idaho.

A. H. FEATHERSTONE.
P. V. WHELAN.

Subscribed and sworn to before me this 3rd day of February, A. D. 1916.

[SEAL.] L. M. SOMMERS,
Notary Public in and for the State of Idaho,
Residing at Wallace, Idaho.

I hereby approve the foregoing bond and sureties this 10th day of February A. D. 1916.

ISAAC N. SULLIVAN,
Chief Justice of the Supreme Court
of the State of Idaho.

Endorsed: Filed Feb. 10, 1916. I. W. Hart, Clerk, by E. S. David, Deputy.

70 In the Supreme Court of the State of Idaho, *ss:*

CHARLES F. RUDDY, Plaintiff and Respondent,
vs.
HERMAN J. ROSSI, Defendant and Appellant.

Return on Citation in Error.

I, Robert H. Pfeil, Sheriff of the County of Shoshone, State of Idaho, hereby certify that I received the within and hereunto annexed Citation in Error on the 23rd day of February, A. D. 1916, and personally served the same upon Herman J. Rossi, the within named defendant and appellant, by delivering to and leaving with said defendant, personally, in the County of Shoshone, State of Idaho, on the 23rd day of February, A. D. 1916, a true copy of said Citation in Error.

Dated this 25th day of February, A. D. 1916.

ROBERT H. PFEIL, *Sheriff.*
By DENNIS GOGGIN, *Deputy.*

71 UNITED STATES OF AMERICA, *ss:*

To Herman J. Rossi, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the state of Idaho, wherein

Charles F. Ruddy, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable I. N. Sullivan, Chief Justice of the Supreme Court of the State of Idaho this 19th day of February in the year of our Lord one thousand nine hundred and sixteen.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk of the Supreme Court of the State of Idaho.

71½ [Endorsed:] In the Supreme Court of the State of Idaho. Charles F. Ruddy, Plaintiff and Respondent, vs. Herman J. Rossi, Defendant and Appellant. Citation in Error. A. H. Featherstone & C. E. Miller, Attorneys for Respondent. Filed on return, Feb. 28, 1916. I. W. Hart, clerk.

72 In the Supreme Court of the State of Idaho.

CHARLES F. RUDDY, Plaintiff in Error,
vs.
HERMAN J. ROSSI, Defendant in Error.

Præcipe for Transcript.

To the Clerk of said Court:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to a writ of error allowed in the above entitled cause and to include in such transcript of record the following papers and exhibits, towit:

1. The transcript on appeal from the District Court of the First Judicial District of the State of Idaho, in and for the county of Shoshone, to the Supreme Court of the State of Idaho.
2. Journal entry showing hearing on appeal and submission of the issues.
3. Decision of the Court.
4. Opinion by Mr. Justice Budge.
5. Dissenting opinion by Mr. Chief Justice Sullivan.
6. Petition of respondent for rehearing.
7. Order overruling petition for rehearing.
8. Petition for writ of error.
9. Assignment of errors.
10. Order allowing writ of error.
11. Order fixing bond on Writ of Error.

73 12. Bond on Writ of Error.

13. Writ of Error.
14. Citation in Error and proof of lodging with Clerk.

15. Proof of service of Citation in Error.
16. This Præcipe.

A. H. FEATHERSTONE.
CHARLES E. MILLER.

Endorsed: Filed Feb. 28, 1916. I. W. Hart, Clerk.

74 SUPREME COURT,
State of Idaho, ss:

Clerk's Certificate to Record.

I, I. W. Hart, Clerk of said Court do hereby certify that the foregoing pages numbered from 1 to 73 inclusive are a true, full and complete transcript of record and proceedings in the case of Charles F. Ruddy, Plaintiff in Error, vs. Herman J. Rossi, Defendant in Error, as specified in the præcipe for transcript included herein, being a copy of the Transcript on Appeal from the District Court of the First Judicial District to the Supreme Court of Idaho; all Record Entries; Opinion of the Court; Petition of respondent for Rehearing; Assignment of Errors; Order allowing Writ of Error; Order fixing Bond on Writ of Error; Bond on Writ of Error; Proof of service of Citation; Præcipe; Original Petition for Writ of Error; Original Writ of Error and Original Citation.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court in my office in Boise, Idaho, this 10th day of March, 1916.

[Seal of Supreme Court, State of Idaho.]

I. W. HART,
Clerk Supreme Court of Idaho.

Endorsed on cover: File No. 25,218. Idaho Supreme Court. Term No. 935. Charles F. Ruddy, plaintiff in error, vs. Herman J. Rossi. Filed April 5th, 1916. File No. 25,218.

Supreme Court of the United States

OCTOBER TERM, 1915

No. 985

CHARLES F. RUDDY,
Plaintiff in Error.

vs.

HERMAN J. ROSSI,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR PLAINTIFF IN ERROR.

A. H. FEATHERSTONE,
CHARLES E. MILLER,
Counsel for Plaintiff in Error.

Wallace, Idaho.

INDEX TO BRIEF

Argument, Points and Authorities 10-11

Conclusion 35-37

Construction of Statute 21-25

Decisions of the Land Office 7-10

Doctrine of Relation 11-21

Statement of the Case 4-5-6

State Court Decisions 32-35

The Federal Decisions 26-32

INDEX TO CITATIONS

24 A. & E. Ency of Law 128 12

24 A. & E. Ency of Law 275 12

24 A. & E. Ency. of Law 277 12

Barnard vs. Bollar, 38 Pac. 728 32-33

Barucord vs. Kuhn, 36 Pa. St. 383 13

Blair vs. Mayer, 124 N. W. 187 33

Brandhofer vs. Brain, 64 N. W. 213 33

Brun et al. vs. Mann, 151 Fed. 145 30

Budd vs. Gallier, 51 Ore. 42 16-17

Churchill vs. Sowards, 78 Iowa 474 15

Clark vs. Bailey, 5 Ore. 343 33

Demarest vs. Wycoop, 3 John Ch. 146 12

Doran vs. Kennedy, 237 U. S. 362 24

Dickerson vs. Bridges, 147 Mo. 235 32

Durham vs. Hussman, 88 Iowa 36 16

Empire Copper Co. vs. Henderson, 15 Ida. 635 22

Faull vs. Cook, 26 Pac 662 33

Gibson vs. Chouteau, 13 Wall. 92-104 13

Gibson vs. Chouteau, 39 Mo. 588 14

Gilkerson vs. Forbes, 15 S. W. 191 32

Gile vs. Hallock, 33 Wis. 523 33

Gould vs. Tucker, 105 N. W. 624 33

Grames et al. vs. Timber C., 215 Fed. 785 31

Hawkins vs Harlan, 68 Cal. 238 15
Hussenan vs. Durham, 165 U. S. 144 24

In re Harris, 140 Pac. 825 32
In re F. A. Hyde & Co., 33 D. of I. Dec. 639 8
In re Kohn, 171 Fed. 570 30
In re Parmenters Estate, 211 Fed. 757 30
In re State of Louisiana, 33 D. of I. Dec. 13 8
In re Edward Wiswell, 6 D. of I. Dec. 265 7

Jackson vs Davenport, (N. Y.) 20 Johns. 537 13
Johnston vs. Jones, (U. S.) 1 Black 221 12
Jean vs. Dee, 32 Pac. 460 33

Kern Oil Co. vs. Clarke, 3 Dec. of D. of I. p. 302..... 9
Klemp vs. Northrop, 70 Pac. 284 32
Kromer vs. Friday, 10 Wash. 642 16

Leman vs. Chapman, 117 N. W. 885 33
Lessieur vs. Price, 12 How. 74 13

MacKenzie vs Hare, 239 U. S. 299 23
Miller vs Little, 47 Cal. 348 32
Michigan L. & L. Co. vs. Rust, 168 U. S. 589, 595-3..... 9

N. P. Ry. Co. vs. Coffman 7

Parsons vs. Venzke, 164 U. S. 89 7

Reed vs Brown, 32 D. of D. I. 383 8
Redfield vs. Parks, 132 U. S. 249 15
Russell vs. Loth, 18 Am. 389 32
Reynolds vs. County, 55 Iowa 93 15
Ruddy vs. Rossi, 28 Idaho 382 16-35

Schultz vs. Levy, 54 Pac. 184 33
Shap vs. McNamara, 54 Cal. 175 15
Small vs. Winchester Fire Ins. Co., 51 Fed. 795..... 15
Seymour vs. Sanders, 3 Dill. 437 26
Smith vs. Schultz, 1 N. W. 329 33
Sprinkle vs. West, 114 Pac. 430 23
Stahl vs. Lynn, 86 Wis. 76 16

Van Doran vs. Miller, 85 N. W. 187 33

Wallowa National Bank vs. Riley, 29 Ore. 289 ...17-31-33
Watson vs. Voorhees, 14 Kan. 254 20-21
Whitney vs. Morrow, 34 Wis. 648 16
Wood vs. Ferguson, 70 Pa. St. 291 13

Supreme Court of the United States

OCTOBER TERM, 1915

No. 985

CHARLES F. RUDDY,
Plaintiff in Error,

vs.

HERMAN J. ROSSI,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF THE CASE.

On August 6, 1903, Charles F. Ruddy, the plaintiff in error, made his homestead entry for the N. E. ¼ of NW. ¼, Sec. 34, T. 48 N., R. 4 E., B. M. Coeur d'Alene, Idaho, land district. He submitted final proof on October 4, 1909, and the receiver's certificate issued on November 12, 1909 On July 8th, 1910, one Bergman, filed his contest affidavit, protesting against the final proof, submitted October 4, 1909. This contest was dismissed in the local land office and an appeal was taken to the Commissioner of the General Land Office, who affirmed the action of the local office on October 13, 1911. A further appeal was then taken to the Secretary of the Interior, who affirmed the decision appealed from. This later order was not made until May 3, 1912. and the entry remained undisposed of and pending in the land office from the date of the receiver's certificate issued November 12, 1909, until said last mentioned date, when the Secretary of the Interior directed the entry to pass to patent. Patent issued August 26, 1912. (Record pages 6, 7 and 8.)

On May 8, 1914, the defendant in error, obtained a judgment against Ruddy in the sum of Nine Hundred Thirty-one and 87|100 Dollars ($931.87) and upon May 12, 1914, he obtained a further judgment against him in the sum of Two Thousand One Hundred Fifteen and 48|100 Dollars ($2,115.48). Attachments had been filed in each of said cases upon

the homestead property, and executions in the two cases were thereupon issued and levied upon the same.

Plaintiff in error immediately, and, before sale could be had, filed his complaint alleging that the indebtedness upon which these judgments were based and each and every item thereof, were contracted by the plaintiff prior to the date of the issuance of the patent, to-wit, prior to August 26, 1912, and that the same were not liens upon said homestead, and praying the decree of the court enjoining the defendant from attempting to sell the said lands to satisfy said judgments, and barring and foreclosing the defendant from asserting or claiming any lien or right of sale against said lands by virtue of said judgments.

Upon the filing of the complaint the court issued a temporary restraining order against the defendant enjoining him from making sales under said Writs of Execution. (Record, pages 3 and 4.)

A trial was had on January 27, 1915. Findings of Fact and Conclusions of Law were duly made in writing and filed by the trial court, all of which were in favor of the plaintiff, and the following decree was thereafter and on the same day made and entered in said cause:

> "It is now therefore ordered, adjudged and decreed that the plaintiff have judgment as prayed for in his complaint herein against the defendant, and that said judgments and attachments described in the complaint of plaintiff, or either or any of them, are not a lien on said

premises described—said complaint as the Northeast Quarter (N.E.¼) of the Northwest Quarter (N.W.¼) Section Thirty-four (34) Township Forty-eight North (T. 48 N.) Range Four (R.4) East Boise Meridian, in Shoshone County, Idaho, or on any part thereof; and it is hereby further ordered, adjudged and decreed that defendant be and he hereby is perpetually enjoined and re straind from in any manner selling or attempting to sell said land or any part thereof to satisfy said judgments or attachments or any of them, and said defendant is hereby barred and foreclosed from asserting or claiming any lien or right of sale against said above described premises under and by virtue of said judgments or attachments or any or either of them, and it is hereby further ordered, adjudged and decreed that the plaintiff have and recover his costs herein taxed at Eleven and 40|100 Dollars." (Record, pages 13-15.)

From this decree the defendant took an appeal to the Supreme oCurt of Idaho, and the decree of the trial court was affirmed as to the judgment for Nine Hundred Thirty-one and 87|100 Dollars ($931.87), but the case was remanded to the trial court with direction to enter decree that the judgment in the sum of Two Thousand One Hundred Fifteen and 48|100 Dollars ($2115.48) and costs amounting to Nineteen and 05|100 Dollars ($19.05) was a valid and subsisting lien upon the premises described in the complaint and that the judgment as so modified be affirmed with costs to the appellant in the sum of Eighty Seven and 40|100 Dollars ($87.40). (Record pages 19 and 20.)

A petition for a rehearing was overruled and denied.

One of the three judges of the Idaho Supreme Court dissented from the majority opinion, both opinions being found in the record at pages 20-28.

The cause comes to this court on Writ of Error, directed to the Idaho Supreme Court.

DECISIONS OF THE DEPARTMENT OF THE INTERIOR.

The approval of final proof, and issuance of certificate thereon by the local office, in no way limits the authority and jurisdiction of the Department over the entry.

In re Edward Wiswell, 6 D. of I. Dec. 265.

Prior to the issuance of patent, the land department may reopen a case, to correct an error in the decision thereof, and readjudicate the same, after due notice to the parties.

N. P. R. R. Co. vs. Coffman, 24 D. of I. Dec. 280.

Until patent has issued the land department has jurisdiction to inquire and determine whether or not a claimant for lands under the public land laws has complied therewith; and, if entry has been made to inquire and determine whether or not it was properly allowed and, if found not to have been so allowed, it is the duty of said department to vacate and cancel such entry.

Reed vs. Brown, 32 D. of I. Dec. 383.

Until the legal title to public lands passes from the government inquiry as to all equitable rights comes within the cognizance of the land department, and the Secretary of the Interior, as the head of that department, may take such action with reference thereto as to him seems in accordance with law.

A controversy involving a claim to public lands is never finally settled until it receives such adjudication as removes the land involved from the jurisdiction of the land department.

In re State of Louisiana, 33 D. of I. Dec. 13.

It is within the jurisdiction and power, and is the duty, of the land department to inquire into and determine questions brought to its attention touching the legality or validity of claims asserted under the public land laws, at any time prior to the issuance of patent.

In re F. A. Hyde & Co., 33 D. of I. Dec. 639.

It is urged that, even if the departmental regulations, at the time of the filing of the selections in question, required that proof of the vacancy or non-occupancy of the selected land should accompany the selections, the acceptance of these selections by the local land officers in the absence of such proof was a waiver of the requirement, and that such waiver is binding on the government.

The proposition is unsound. If followed as a rule of law the Secretary of the Interior would be prac-

tically shorn of the supervisory power and authority over the disposal of the public lands, vested in him by Sections 441, 453, and 2478 of the Revised Statutes. The action of the local land officers upon questions of law or fact respecting the disposal of the public lands does not conclude their superior officers or the government. Such action is, in all cases, reviewable by the Commissioner of the General Land Office, and by the Secretary of the Interior, as the proper administration of the law or demands of justice may require. (Orchard vs. Alexander, 157 U. S. 373; Knight vs. Land Association, 142 U. S. 161;

Kern Oil Co. vs. Clarke, 31 Decisions of D. of I., p. 302.

And is was held by the Federal Supreme Court in the case of Michigan Land and Lumber Co. vs. Rust (168 U. S. 589, 592-3) as follows:

> Generally speaking, while the legal title remains in the United States, the grant is in the process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. Strother vs. Lucas, 12 Pet., 410, 454; Grignon's Lessee v. Astor, 2 How., 319; Chouteau v. Eckhart, 2 How., 344; Glasgow v. Hortiz, 1 Black, 595; Langdeau v. Hanes, 21 Wall, 521; Rvan v. Carter, 93 U. S. 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, Rev. Stat. 3449; Frasher v. O'Connor, 115 U. S.,

> 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent. Bagnell v. Broderick, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.* * * In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed.

ARGUMENT, POINTS AND AUTHORITIES.

A Federal Question.

This record presents a Federal question, pure and simple. The sole issue involved is the construction of Section 2296 of the Revised Statutes of the United States, relating to homesteads, which is as follows:

> "No Lands Acquired Under The Provisions of This Chapter Shall in Any Event Become Liable to The Satisfaction of Any Debt Contracted Prior to The Issuing of The Patent Therefor."

The judgments obtained by the appellant against the respondent and involved herein, are both based upon "debts contracted prior to the issuing of the patent."

It was insisted by the defendants in error that the patent, issued on August 26, 1912, related back to

the date of the receiver's receipt, issued November 12, 1909, and that, in legal contemplation, the true date of the patent is the last date mentioned, and, therefore, there could be no exemption from any debt incurred after November 12, 1909. This view was sustained by the Idaho Supreme Court.

The plaintiff in error submits that the doctrine of relation can only be applied to titles; that this statute does not relate to the subject of titles but to that of exemptions; and that the statute means exactly what it expresses in plain terms.

This discussion will be limited to two propositions: the origin and meaning of the doctrine of relation, and the intention and purpose of Congress in enacting this statute.

PROPOSITION I.

The Doctrine of "Relation" as Applied to Govenment Patents For Land, is Never Invoked Except Where Necessary to Give Effect to The Intent of The Statute, or to Cut Off Intervening Claimants.

By the doctrine of relation is meant that principle by which an act done at a certain time is considered by a fiction of law to have been done at some antecedent time. It is usually applied where several proceedings are essential to complete a particular transaction, the last proceeding which consummates the transaction being held for certain purposes to take

effect by relation as of the day when the first proceeding was had. The doctrine is a fiction of law resorted to for the promotion of justice and of the lawful intention of parties, by giving effect to acts or instruments which without it would be invalid.

24 A. & E. Ency. of Law, p. 275.

The principle, while generally applicable in common law or statutory proceedidngs, is particularly appropriate to proceedings in equity and is adopted by courts of chancery in analogy to the maxim that "equity considers as done that which ought to be done."

24 A. & E. Ency. of Law, p. 275.

Demarest vs. Wycoop, 3 Johns Ch. 146.

The doctrine of relation *is applied only for the promotion of justice and for the protection of persons who stand in some privity with the party* who has acquired the equitable claim or right to the land. It will not be given operation to shield a trespasser from liability for his wrongful acts.

24 A. & E. Ency. of Law, p. 128.

Stahl vs. Lynn, 86 Wis. 75.

The doctrine of relation *will be enforced only for the furtherance of justice*, and will not be applied to defeat or impair intervening rights or equities of innocent third persons who are strangers to the transaction

24 A. & E. Ency. of Law, p. 277.

Johnston vs. Jones, (U. S.) 1 Black 221.

Jackson vs. Davenport, (N. Y.) 20 Johns 537.

Wood vs. Ferguson, 70 Pa. St. 291.

Barucord vs. Kuhn, 36 Pa. St. 383.

The leading American case upon the doctrine of relation, as applied to patents for public lands, is that of Gibson vs. Chouteau, 13 Wall. 92-104, in which the opinion was rendered by Mr. Justice Field. It is so applicable to the question presented here, that we quote the decision at some length.

> "By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the Recorder of Land Titles under the Act of Congress. At that time the title of the claimant to the land desired by him, had its inception; and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date."

Lessieur vs. Price, 12 How. 74.

> "The Supreme Court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the lo-

cation of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title,' said the court, 'in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before.'"

Gibson vs. Chouteau, 39 Mo. 588.

"The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title."

Lynch vs. DeBernal, 9 Wall. 315 (76 U. S. XIX, 714);

Jackson vs. Bard, 4 Johns, 230;

Heath vs. Ross, 12 Johns, 140.

Lyttleton vs. Cross, 3 Barn. & Cres. 325, 328.

"The defendants in this case *were strangers to that party and to his equitable claim*, or equitable title, as it is termed, not concerning themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected."

The doctrine of relation was held not applied to a patent so as to relate back to the issue of the register's certificate and start the statute of limitations to running.

Redfield vs. Parks, 132 U. S. 349.

The rule of relation cannot be invoked, to put in operation a forfeiture clause of a policy of insurance which passed to an assignee, proceedings for the appointment being commenced before the loss occurred.

Small vs. Weschester Fire Ins. Co., 51 Fed. 795.

The doctrine of relation cannot be resorted to to transfer a title derived under a Sheriff's deed, to the date of the foreclosure sale so as to let in the lien of a subsequent judgment.

Shay vs. McNamara, 54 Cal. 175.

The rule that by relation an after acquired title by a mortgage inures to the benefit of the mortgagee will not be given effect when it will work manifest injustice, as to give a mortgagee preference over a vendor's lien for unpaid purchas money.

Hawkins vs. Harlan, 68 Cal. 238.

The doctrine of relation will not apply in order to subject land to taxation at a time when the predecessor held neither title nor equity.

Reynolds vs. County, 55 Iowa, 93.

The rule was refused application so as to let in an adverse possession.

Churchill vs. Sowards, 78 Iowa 474.

Until payment for public land is made no equitable title passes from the United States so as to render the land subject to taxation and validate by relation a sale for delinquent taxes prior to patent.

Durham vs. Hussman, 8 Iowa, 36.

Nor, will relation be permitted to defeat the claims of a widow where final proof was made before the marriage ceremony and patent issue after such marriage.

Kromer vs. Friday, 10 Wash. 642.

The doctrine of relation has no application to an action of waste where there is no privity of estate between the parties when the alleged waste was committed.

Whitney vs. Morrow, 34 Wis. 648.

A deed will not relate back to the contract for sale so as to preevnt the vendor from maintaining an action against a trespasser for removing timber from the land after the contract, but, before completion of the sale by payment and delivery of the deed.

Stahl vs. Lynn, 86 Wis. 76.

The majority opinion, 28 Idaho, at p. 382, lays down the following rule:

> "When the final receipt or certificate is issued to the homestead settler, the land becomes liable for the payment of debts contracted subsequent thereto, even though prior to the issuance of the patent."

In support of this proposition the court cites Budd

vs. Gallier, 51 Ore. 42. No lessor appropriate citation of authority could have been made. In that case the title acquired was the ordinary one by purchase and the statute in question here was in no way involved. The court simply held that on payment of the purchase price, the equitable title vested in the purchaser and that the land was then liable to execution upon a judgment against the purchaser.

The opinion in Budd vs. Gallier was written by Mr. Chief Justice Bean who is now the senior United States District Judge for Oregon. The construction of the precise Federal statute involved here was before the Oregon Court in Wallowa National Bank vs. Riley, 29 Ore. 289, and, again, speaking through Chief Justice Bean, on the doctrine of relation as applied to our statute, the opinion declares as follows:

> "Section 4 of the act of Congress of May 20, 1862, granting homesteads on the public lands (section 2296, Rev. St. U. S.), provides that 'no lands acquired under the provisions of this act shall in any event become liable to the saisfaction of any debt contracted prior to the issuing of the patent therefor.' The literal terms of this section clearly exempt the lands of the homesteader from liability for debts which antedate the issuing of the patent. But the contention for the plaintiff is that, in contemplation of law, the patent issues when the final proof is made, and accepted by the land department, and hence the land is liable for debts contracted thereafter: and this is the view of the Supreme Court of Colorado. Mercantile Co. v. Davis, 21 Pac. 495. So far as the question of title is concerned, this question may be conceded, but the *vice of the*

position, as applied to the case before us, lies in the fact that we are not dealing with title, but with the question of exemption under a valid statute which declares, in plain and direct terms, that the land granted thereby shall not be liable for debts contracted prior to the happening of a specific event. It has been frequently held that, as between a settler and the government a vested right to a patent is equivalent to a patent issued, and that thereafter the government holds the legal title in trust for the settler, and, when issued, the patent will relate back to the inception of the right of the patentee, when necessary to cut off the vested rights of intervening claims. Witherspoon vs. Duncan, 4 Wall. 210; Stark vs. Starris, 6 Wall. 402; Cornelius vs. Kessel, 128 U. S. 456, 9 Sup. Ct. 122; Deffenback vs. Hawke, 115 U. S. 392; 6 Sup. Ct. 95. But this rule is one of title, and has no bearing upon the question of exemption. By the federal constitution, congress is expressly vested with the power of making all needful rules and regulations respecting the public domain, and under this power it may dispose of public lands on such terms and conditions, and subject to such limitations and restrictions, as in its judgment may be deemed advisable; and its decision is conclusive in all other places, and before all judicial tribunals. Gile vs. Mallock, 33 Wis. 523; Seymour vs. Sanders, 3 Dill. 437, Fed. Cas. No. 12, 690; Russell vs. Lowth, 21 Minn. 167; Miller vs. Little, 47 Cal. 348. In pursuance of this power, and with a view to encourage the settlement of the public domain, Congress has invited heads of families to settle upon small parcels thereof, and make for themselves homes, with the assurance that in no event shall the land become liable to the satisfaction of any debt contracted prior to the issuing of the patent, although in the mean-

time the owner may become the owner of the equitable title. It will thus be seen that qeustions as to when the period of exemption terminates, and when title attaches, cannot be determined by the same rule. The date of the issuing of the patent is made by statute the criterion by which the question of liability is to be determined, and not the condition of the title, or the question of relation, as applicable to the holder thereof. It was within the power of congress to designate any point of time which should fix the sale for antecedent debts, and whether such time should be at or upon the happening of some specific event after the vesting of the equitable title in the settler was a matter of public policy, for Congress to determine; and, its judgment having been exercised, it is not for the Courts to overrule its conclusion by a technical rule of construction. It has, in plain and explicit terms, declared that the land of the homesteader shall not be liable for the debts of the owner or claimant contracted prior to the issuing of the patent and thus made the date, and not the date of final proof, or the time when a right accrues, as the point which divides the liability and nonliability of the land. In our opinion, therefore, the land of a homesteader is exempt from liability for all debts contracted prior to the actual issuing of the patent by the government of the United States, whether contracted before or after the date of final proof; and in this conclusion we are supported by a recent well-considered case from the Supreme Court of California, holding the same doctrine. Bernard vs. Boller, 38 Pac. 728. The provisions of the homestead law involved here have frequently been the subject of judicial examination and discussion, and although the particular question before us has not been passed on by any of the courts, so far as we

can learn, except in the states of Colorado and California, yet the general trend, we think, of the decisions sustains the view we have expressed. Miller vs. Little, 47 Cal. 349; Jean vs. Dee (Wash.) 32 Pac. 460; Russell vs. Lowth, 21 Minn. 167; Sorrels vs. Self, 43 Ark. 461; Boggan vs. Reid (Wash.) 20 Pac. 426; Gilkerson-Sloss Co. vs. Forbes, 56 Ark. 148, 15 S. W 191; Bladwin vs Boyd, 18 Neb. 444, 25 N. W. 580, Seymour vs. Sanders, 3 Dill. 437, Fed. Cas. No. 12, 690; Smith v. Steele, 13 Neb. 1, 12 N. W. 830; Gile vs. Hallock, 32 Wis. 523. It follows that the decree of the court below must be affirmed, and it is so ordered"

The cases of Stark vs. Starrs, 6 Wall· 402; Carroll vs. Safford, 3 Howard 441, and the other Federal cases cited in the brief, or quoted, to sustain appellant's first proposition, simply apply the doctrine of relation to titles and none of them refer, at all, to exemptions.

There is neither reason nor ground for applying the doctrine of relation to the case at bar. The appellant in no way connects himself with the title to this homestead. There is no privity of estate between appellant and respondent. No equity in favor of the appellant exists requiring the invoking of the doctrine of relation for its protection. The appellant is simply an ordinary judgment creditor whose interests are hostile to the very object of the statute—the protection of the homesteader—which Congress had solely in view·

In the case of Watson vs. Voorhees, 14 Kan. 254,

it was sought to foreclose a mortgage upon a homestead and the defendant pleaded the Federal statute, claiming the property was exempt. The court held that the inhibition did not extend to the voluntary acts of the defendant and rejected the defense. But in the course of the opinion, Brewer, J., defines the limitation placed by Congress in the act, as follows:

> "We deem it unnecessary to examine this question, for, conceding the power, it does not seem to us that Congress intended by this act to place any restriction on the owner's control of the land. The limitation was on the *creditor*, and not on the *debtor*."

The italics are those of the court and not ours.

PROPOSITION II.

Lands Acquired Under The Federal Homestead Laws Cannot In Any Event Be Subjected To The Satisfaction Of Any Debt Contracted Prior to The Issuing of The Patent Therefor.

The language of the statute in question here is so clear and explicit that there can be no reason for applying any of the known rules governing statutory construction to give it intelligent meaning. As Judge Brewer said, in Watson vs. Voorhees, *supra*, "the limitation is on the *creditor* and not on the *debtor*." Congress could have put in some other date as well as that of the patent and it could just as easily have

said "prior to the issuing of the receiver's receipt," as what it did actually say. Congress, undoubtedly, had in mind the uncertainty of the proceedings in the land office. The receiver's receipt is not final. Many things happen, especially long delays as in this case. While the receiver's receipt issued on November 12, 1909, without any fault on the part of Ruddy, a protest was later filed, suspending the issuance of the patent, which remained pending until May 3, 1912, when it was denied, a waiting period of more than two and one half years.

Mr. Justice Stewart, speaking for the Idaho Supreme Court in Empire Copper Co. vs. Henderson, 15 Ida. 635, adopts the rule laid down in Vol. 2 of Sutherland on Statutory Construction and quotes the same as follows:

> Sec. 363. "The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. 'The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute.' * * * 'In construing statutes the proper course is to start out and follow the true intent of the legislature, and to adopt that sense which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature.'"
>
> Sec. 364. "It is the intent of the law that is to be ascertained, and the courts do not substitute their views of what is just or expedient. Courts are not at liberty to speculate upon the intentions

> of the legislature where the words are clear, and to construe an act upon their own motions of what ought to have been enacted."

Withing these definitions, the intent of Congress as expressed in the act would appear to be entirely clear and the courts are not at liberty to construe this act upon their own notions, that the doctrine of relation should be applied.

Upon questions, relating to statutory construction, this Court has, very recently, expressed itself.

In the case of MacKenzie vs. Hare, 239 U. S. 299, the question being upon the meaning of the statute enacted March 2, 1907, relating to the effect upon the American woman, as to nationality, upon her marriage to a foreigner, it was sought by the plaintiff to read into this statute that it was not the intention to deprive an American born woman, remaining within the United States, of her citizenship by reason of her marriage to a resident foreigner. Mr. Justice McKenna disposes of this contention thus:

> "Does the act invite or permit such assistance? Its declaration is general. 'That any American woman who marries a foreigner shall take the nationality of her husband.' There is no limitation of place; there is no limitation of effect, the marital relation having been constituted and continuing. For its termination there is provision, and explicit provision. At its termination she may resume her American citizenship if in the United States by simply remaining therein; if abroad, by returning to the United States, or within one year registering as an American

> citizen. The Act is therefore, explicit and circumstantial. It would transcend judicial power to insert limitations or conditions upon disputable considerations of reasons which impelled the law, or of conditions to which it might be conjectured it was addressed and intended to accommodate."

In the case of Doran vs. Kennedy, 237 U. S. 362, Mr. Justice McKenna speaks as follows, as to the statute in issue in this case:

> "Sec. 2296 provides that no lands acquired under the provision of this chapter, shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."
>
> "The prohibition is clear and direct; * * *."

If this statute should be construed so as to substitute the words "patent should have issued" for the words "patent was issued," it cannot be said that the prohibition is clear and direct. In the majority opinion of the court below great stress has been laid upon the opinion in the case of Leonard vs. Ross, 23 Kan. 292, rendered while Mr. Justice Breewr, later of this court, was a member of the Kansas Court.

As showing Mr. Justice Brewer's position on some of the questions involved here, we append a copy of a portion of his opinion in the case of Hussenan vs Durham, 165 U. S. 144, along the line of the argument of Justice Miller, already referred to. On the doctrine of relation, he is found to be squarely in accord with that advanced in respondent's brief.

"Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backwards than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1859, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day. In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertance or fraud a certificate of location (which is equivalent to a receipt) is issued when in fact no consideration has been received, no equitable title is passed thereby; and a convyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere. Thus, in Reynolds vs Plymouth County, 55 Iowa 90, it appeared that certain forged and counterfeit agricultural college scrip was located upon a tract of land, and that, after the issue of the certificate of location and before any patent, state taxes were assessed and levied thereon Thereafter the forgery was discovered, the locator substituted genuine scrip or money, and a patent was issued The court held that the taxes thus assesed, and levied during the interval between the original illegal entry and location and the subsequent substitution of genuine scrip or money were invalid, saying:

" 'In order to protect a title, or to attain the ends of justice, the Court will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands."

THE FEDERAL DECISIONS.

This precise question has never been before this court, but it has been passed upon by, at least, five of the lesser United States courts and all of these decisions are in a line with the contention of the plaintiff in error.

The statute was enacted by Congress on May 20, 1862. So far as we have been able to ascertain, it did not come before the courts for judicial interpretation until 12 years later. In 1874 the case of Seymour vs. Sanders, involving this statute, was heard and determined by U. S. Circuit Judge, Hon. John F. Dillon, sitting with U. S. District Judge Nelson, in the District of Minnesota, which is reported in 3 Dill. 437 and as number 12,690 of Federal cases. The statute was held to mean what it said. We give his opinion in that case in full:

> DILLON, Circuit Judge. "Congress is invested by the constitution with the express power of disposing of and making all needful rules and regulations respecting the public domain. This gives to Congress authority to dispose of the public lands without limitation, and leaves to its discretion the mode of disposition. U. S. vs. Gratiot, 14 Pet. (39 U. S.) 526."
>
> "If the land here in question were within one of the territories of the United States it would hardly be doubted that Congress could lawfully provide in an act for the disposal of the public lands that it should not be liable for debts contracted by the homestead settler prior to the issue of the patent. This the learned counsel for the

plaintiffs conceded, but they claim that Sec. 4 of the homestead act of Congress, of May 20th, 1862, should be limited in its application to the public domain outside of the respective states. But the power of Congress within the limits of the state of Minnesota is, in our judgment, precisely the same as respects the mode and purposes of disposing of the public lands, as it is within the territories."

"Over the public lands, so far as concerns their disposition, whether as to time, mode or objects, the state has no authority whatever. On the other hand, the authority of Congress is apparent and exclusive. Any question upon this subject which might otherwise exist, growing out of the respective powers of the state and federal governments, is precluded by a solemn compact in the act providing for the admission of the state, and in the constitution of the state itself, to the effect that the state would 'never interfere with the primary disposal of the soil within the same by the United States, or with any regulation Congress might find necessary for securing the title in said soil to bona fide purchasers thereof.'"

"Thus the plenery power of Congress over the disposition of the public lands within the state is expressly recognized to exist by the organic law of the state; and we hold that Congress may dispose of them at such time, in such manner, and for purposes as in its judgment it may deem best."

"The title of all public lands must pass and vest according to the laws of the United States. Wilcox vs. Jackson, 13 Pet. (38 U. S.) 498, 517. And, undoubtedly, it is true as a general proposition, that after the title has passed from the United States, and is fully vested in purchasers from it, the land becomes subject to state legis-

lation, and the power of the general government with respect to it ceases, except so far as it is otherwise lawfully provided in the act by which Congress disposes of the land."

"It has been expressly adjudged by the Supreme Court that Congress cannot be confined to any particular mode of disposition, but may lease or otherwise dispose of the public domain in its discretion. U. S. vs. Gratiot, *supra.*"

"Down to 1862, Congress had never adopted the policy of offering the public lands to those who would cultivate and make permanent homes upon them, and the act of May 10th, of that year, is the first homestead law of the general government. It would be difficult, perhaps, to point to any enactment of the Federal Congress more wise in conception, just in policy, and beneficial in results, than this. And those benefits were chiefly to the states by securing therein at an early day a large body of permanent settlers upon the public lands. By this act a quantity of land not exceeding 160 acres is given to any head of a family possessing the required qualifications, on condition of settlement, cultivation and continuous occupancy as a home by the settler for the period of five years. During this period the settler is prevented any actual change of residence, or from abondoning the land for more than six months at any time. If he complies with the provisions of the act he becomes entitled to a patent at the end of five years."

"Section 4, the validity of which, in its application to this case, is the question to be settled, is in these words: 'No lands acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of a patent therefor.'"

"It is not difficult to discover the reason for this provision. A leading object of the enactment

was to benefit the poor man who was unable to buy the lands at government price and receive his title at once and without conditions; and it undoubtedly occurred to Congress, that many persons who had been unfortunate and were insolvent would avail themselves of the act; and conceiving that the creditor in such cases had no equity to subject to the payment of his debt, lands which had been given to the debtor by the bounty of the government, and to protect the debtor and to encourage persons to settle upon the public domain under the act, the fourth section was adopted. In the case before us, the debt upon which the plaintiffs obtained judgment was created after the defendant had settled upon the land under the homestead act of Congress, and before the expiration of the five years, so that the creditor was along apprised that the land was not liable to the payment of his debt, and certainly he is without just ground of complaint against the exemption. His legal ground of objection, however, is that the exemption is an invasion of the lawful rights of the state, and conflicts with her laws, which exempt only 80 acres of land to the debtor. It will be observed that Congress does not attempt to exempt the land from debts contracted after the patent has issued, or, in other words, after the title has passed from the general government. Before the title has thus passed, Congress, under its power to dispose of the public lands, may prescribe the terms and conditions upon which the disposition shall be made, and as against the state, it is our judgment that it was competent for Congress as incidental to the power of disposal of the lands, and to promote the enlightenment and humane policy it had in view, to provide that the lands acquired by the homestead settler should be held by him, free from all antecedent debts."

"This question, which is one of great practical moment, and affecting, as counsel inform us, very many persons, does not appear to have before arisen for judicial determination, but we feel quite confident that our conclusion is correct."

"Agreeably to the stipulation of counsel, in case we should be of opinion that the fourth section of the act is valid, judgment will be entered for the defendants."

In Brun et al vs. Mann, 151 Fed. 145, the U. S. Circuit Court of Appeals for the Eighth Circuit, after citing the statute, says:

"In this state of the law and with this provision of the Constitution (Art. 1, sec. 10), in force Congress exempted the lands which it practically donated to the entrymen under the homestead and timber culture acts from any debt contracted previously by the patentees, but from no other liabilities."

In re Kohn, 171 Fed. 570, U. S. District Judge Amidon says.

"* * * Section 2286 of the Revised Statutes declares that the homestead shall not in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. There is no evidence presented here showing that any patent has ever been issued. It is the issuance of the patent which fixes the time when the property shall become liable to subsequent debts of the homesteader. Barnard vs. Boller, 105 Cal. 214; Wallowa National Bank vs. Riley, 29 Ore. 289."

In re Parmeters Estate, 211 Fed. 757, the debts in question there, were all incurred prior to the issuance of the patent and it was held that while the

act extended to the debts of the homesteader, it would not protect his successor in interest against the latter's debts.

In Grames et al vs. Consolidated Timber Co., U. S. District of Oregon, 215 Fed 785, decided June 29, 1914, Wolverton, J. thus construes this statute:

> "It is first urged in this relation that the Gage attachment, judgment and consequent sale of the homestead are void, because the attachment and judgment were obtained upon a demand that had accrued prior to the issuance of the patent to the Grames homestead; and, second, that the mere deposit of the final certificate and the contract of sale with the bank as security created (1) a lien upon the homestead, and (2) a lien upon the purchase money."
>
> "The first contention is sound. The statute section 2296, R. S. Comp. St. 1901, p. 1398) provides that:
>
> " 'No lands (acquired) under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent.'
>
> "This provision has received a literal construction, and comprises any debt accruing or existing prior to the date of the issuance of the patent, and, although in some cases affecting the title to the homestead, where the issuance has relation back to the issuance of the final certificate, the clause can bear no such interpretation, as it applies to the exemption designed for the benefit of the homesteader. Nor do I think that the exemption is waived by the homesteader's failure to claim it before or at the time of judgment, or the sale of the premises on execution, where the proceeding is *in invitum*. 1 National Bank vs.

Riley, 29 Ore., 298; Dickerson vs. Bridges, 147 Mo. 235."

We have been unable to unearth a single decision by a Federal court, holding the homestead liable for any purely contract debt, incurred prior to the issuance of the patent—nor the least intimation of such a construction of the statute.

STATE SUPREME COURT DECISIONS.

This statute has been construed by the Supreme Courts of all of the public land states of the west, and with the exception of three, one of which is doubtful, they have unequivocally held that the statute means exactly what it says and that the date of limitation is the date of the patent. And we cite the mollowing cases as maintaining this view:

Arizona:

In re Harris, 140 Pac. 825.

Arkansas:

Gilkerson vs. Forbes, 15 S. W. 191.

California:

Barnard vs. Bollar, 38 Pac. 728.

Klemp vs. Northrop, 70 Pac. 284.

Miller vs. Little, 47 Cal. 348.

Minnesota:

Russell vs. Lowth, 18 Am. R. 389.

Missouri:

Dickerson vs. Bridges, 147 Mo. 235.

Nebraska:

Brandhofer vs. Brain, 64 N. W. 213.

Smith vs. Schultz, 1 N. W. 329.

Leman vs. Chapman, 117 N. W. 885.

Oregon:

Clark vs. Bailey, 5 Ore. 343.

Faull vs. Cook, 26 Pac. 662.

Bank vs. Riley, 45 Pac. 767.

Schultz vs. Levy, 54 Pac. 184.

S. Dakota:

Gould vs. Tucker, 105 N. W. 624.

Blair vs. Mayer, 124 N. W. 721.

Van Doran vs. Miller, 85 N W. 187.

Washington:

Jean vs. Dee, 32 Pac. 460.

Sprinkle vs. West, 114 Pac. 430.

Wisconsin:

Gile vs. Hallock, 33 Wis. 623.

We have quoted, at length from Wallowa National Bank vs. Riley, *supra*. Because, in addition to interpreting the statute, it refutes the application of the doctrine of relation, we, also, quote at some length, from the California case of Barnard vs. Bollar, *supra*.

> "The contention of appellant is that when respondent had made his final proofs and received his receipt the right to a patent vested in him; that he then had a perfect equitable title to the land, which he could convey; and that when the patent issues it relates back to the act upon which the equitable title depends; citing Morton vs.

Nebraska, 21 Wall. 660; Barney vs. Dolph, 97 U. S. 652; eRichart vs. Felps, 6 Wall 160; Stark vs. Starrs, 6 Wall. 402. Other cases are also referred to as illustrative of the principle that at the stage of proceedings indicated the equitable title is vested in the claimant and that thereafter the government holds the legal title in trust until the patent issues. We agree in the main with the position of the appellant, so far as dealing with the title is concerned, independent of statutory provisions; but his conclusion, in the face of the statute quoted above, cannot be maintained. Under that statute the condition or existence of the equitable title is not made the criterion of liability for antecedent debts. The land shall not, in any event, become liable to the satisfaction of any debt rontracted prior to the issuing of the patent therefor. The date of issuing the patent is made the point of time which divides the liability and nonliability of the land. It is this event or act which determines the question of liability, and not the title or the question of relation as applicable to the holder thereof, which must be taken as the criterion. Congress has in plain and direct terms exempted the land from the debts of its owner or claimant contracted up to the happening of a specific event, viz, 'to the issuing of the patent therefor.' Had the statute provided that homesteads should not be liable for the debts of the patentees thereof contracted during their natural lives, or for 10 years after the issuance of the patent, its constitutionality being conceded, the end of the life of the patentee or the expiration of the 10 years would afford the test by which to measure the liability, and in such a case, it is believed, no just claim of liability could be maintained on account of debts contracted before the expiration of time specified or event mentioned upon the ground that the

patentee had previously held the title, legal or equitable. The provision of section 2296 is regarded as being equally explicit with the case supposed."

The respondent relies upon the decisions of three states: Colorado, Kansas and Oklahoma. Great confidence is placed in the Colorado case of Struby-Eastabrook Mercantile Co. vs. Davis, 31 Pac. 45. This case is cited by the Oregon cvourt, in Wallowa National Bank vs. Riley, 29 Ore. 289, and expressly disapproved. Oklahoma has wobbled. In the case of Stark Bros. vs. Glazer, 91 Pac. 1040, the case of Flanagan vs. Forsey, one of appellant's leading cases, is overruled and this statute is construed according to the respondent's contention here, following Russell vs. Lowth, 21 Minn. 167. The Kansas case of Leonard vs. Ross, 23 Kan. 206, was probably rendered before Judge Dillon's decision, *supra,* was published, or a different result would, doubtless, have been reachd.

The Idaho Supreme Court held that the words "prior to the issuing of the patent" should be construed as reading "prior to the issuance of the final receipt" and it found this date to be November 12, 1909. (Record, page 25.)

The attention of the court was called to the facts that, although the receiver's certificate was awarded to the homesteader on November 12, 1909, within the year allowed by law, Bergman initiated a contest

in the local land office. This contest was denied and Bergman took successive appeals from the action of the local office to the Commissioner and the Secretary of the Interior, clearly showing that the General Land Office continued to exercise active judicial authority over the entry. (Petition for rehearing, Record page 31.)

On May 3, 1912, the Secretary rendered his judgment in these words:

> "The Department upon careful consideration of the entire record concurs in the conclusions reached. Bergman's contest is therefore dismissed. The decision appealed from is affirmed, and the entry will pass to patent." (Record, pages 7 and 8.)

The patent could not issue until the order to pass to patent was made by proper authority and in due course of the statutory proceedings. Assuming, as held by the court below, that Congress did not mean what it said in plain English, but that the time referred to was when the entry had actually become final, the date would be May 3rd, 1912. An inspection of the items making up the judgment, dated after May 3rd, are: "Aug. 2, 1912, Merriam & Merriam, $15.00 and Aug. 9, 1912, of N. Y. Ins. $16.80—a total of $31.80. (Record page ...)

It is respectfully submitted that to sustain the contention of the defendant in error in this case would do violence to the plainest rules of statutory con-

struction; that the clear weight of authority and the inherent logic of the cases, sustain the judgment of the District Court for the said County of Shoshone, and that the judgment of the Supreme Court of Idaho, should be reversed and that of the trial court affirmed; and that the respondent is entitled to a judgment for his costs in all of the courts.

A. H. FEATHERSTONE,
CHARLES E. MILLER,
Counsel for Plaintiff in Error.

Residence and P. O. Address:
Wallace, Idaho.

RUDDY *v.* ROSSI.

ERROR TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 17. Submitted November 13, 1918.—Decided December 9, 1918.

Section 4 of the Homestead Act of May 20, 1862, (§ 2296, Rev. Stats.), providing that no lands acquired under the act shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of patent therefor, applies as well to debts contracted after final entry and before patent as to debts contracted before final proof, and in both respects is within the constitutional power of Congress.

28 Idaho, 376, reversed.

THE case is stated in the opinion.

Mr. Charles E. Miller for plaintiff in error. *Mr. A. H. Featherstone* was also on the brief:

The jurisdiction of the Interior Department respecting a homestead entry is not divested until the patent is issued. [Citing Land Decisions.]

The doctrine of relation is inapplicable in the construction of the statute. Debts contracted after final entry but before patent are within the intention no less than the clear letter. *Wallowa National Bank* v. *Riley*, 29 Oregon, 289; *Watson* v. *Voorhees*, 14 Kansas, 254; *Doran* v. *Kennedy*, 237 U. S. 362; *Hussman* v. *Durham*, 165 U. S. 144; (*cf. Leonard* v. *Ross*, 23 Kansas, 292);

Seymour v. *Sanders*, 3 Dill. 437; *Brun* v. *Mann*, 151 Fed. Rep. 145; *In re Kohn*, 171 Fed. Rep. 570; *In re Parmeter's Estate*, 211 Fed. Rep. 757; *Grames* v. *Consolidated Timber Co.*, 215 Fed. Rep. 785.

Numerous decisions by the Supreme Courts of Arizona, Arkansas, California, Minnesota, Missouri, Nebraska, Oregon, South Dakota, Washington and Wisconsin reach the same conclusion.

No appearance for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

By "An act to secure homesteads to actual settlers on the public domain," approved May 20, 1862, c. 75, 12 Stat. 392, Congress prescribed the conditions under which citizens could acquire unappropriated public lands in tracts of not exceeding one hundred and sixty acres. A manifest purpose was to induce settlement upon and cultivation of these lands by those who, five years after proper entry, would become owners in fee through issuance of patents. The great end in view was to convert waste places into permanent homes. Such occupancy and use constituted a most important consideration and were rightly expected to yield larger public benefits than the small required payment of one dollar and a quarter per acre.

Decision of this cause requires us to consider the meaning and validity of § 4 of the act (Rev. Stats., § 2296) which provides: "No lands acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the patent therefor."

Plaintiff in error made preliminary homestead entry of designated land within the State of Idaho August 6, 1903; submitted final proofs October 4, 1909; obtained

final receipt and certificate November 12, 1909; final patent issued August 26, 1912. In 1914 two judgments were obtained against him; the first upon indebtedness incurred prior to November 12, 1909; the second upon debts contracted subsequent to that date and prior to patent. Executions were issued and levied upon the homestead; and thereupon the proceeding under review was begun to declare asserted liens invalid and a cloud upon the title. The court below held the first judgment unenforceable against the land since it represented indebtedness which accrued prior to final entry. It further held the second judgment could be so enforced as it was based upon debts contracted after final entry, at which time the homesteader became legally entitled to his patent. 28 Idaho, 376.

The language of § 4 is clear and we find no adequate reason for thinking that it fails precisely to express the law-maker's intention.

Did Congress have power to restrict alienation of homestead lands after conveyance by the United States in fee simple? This question undoubtedly presents difficulties which we are not disposed to minimize. In *Wright* v. *Morgan*, 191 U. S. 55, 58, a similar point was suggested but not decided.

The Constitution declares "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States"; and it is settled that Congress has plenary power to dispose of public lands. *United States* v. *Gratiot*, 14 Pet. 526, 537. They may be leased, sold or given away upon such terms and conditions as the public interests require. Instead of granting fee simple titles with exemption from certain debts, long leases might have been made or conditional titles bestowed in such fashion as practically to protect homesteads from all indebtedness.

"The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." *McCulloch* v. *Maryland*, 4 Wheat. 316, 421.

Acting within its discretion, Congress determined that in order promptly to dispose of public lands and bring about their permanent occupation and development it was proper to create the designated exemption; and we are unable to say that the conclusion was ill-founded or that the means were either prohibited or not appropriate to the adequate performance of the high duties which the legislature owed to the public.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HOLMES:

This case involves a question of theory that may be important and I think it desirable to state the considerations that make me doubt. The facts needing to be mentioned are few. On August 26, 1912, the United States conveyed land in Idaho to Ruddy in fee simple, in pursuance of a homestead entry by Ruddy on August 6, 1903, final proof on October 4, 1909, and final receipt of the purchase price on November 12, 1909. In September, 1912, after the conveyance, Rossi began suits against Ruddy, attaching this land, and in June, 1914, levied executions upon the same. The debts for which the

suits were brought were incurred before the issue of the patent and the present proceeding is to prevent Rossi from selling the land to satisfy the judgments. The question arises under Rev. Stats., § 2296, providing that no lands acquired under that chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor. The Supreme Court of Idaho narrowed the issue to the case of debts contracted after final proof, but that distinction is not important to the difficulty in my mind.

My question is this: When land has left the ownership and control of the United States and is part of the territory of a State not different from any other privately owned land within the jurisdiction and no more subject to legislation on the part of the United States than any other land, on what ground is a previous law of Congress supposed any longer to affect it in a way that a subsequent one could not? This land was levied upon not on the assertion that any lien upon it was acquired before the title passed from the United States, but merely as any other land might be attached for a debt that Rossi had a right to collect, after the United States had left the premises. I ask myself what the United States has to do with that. There is no condition, no reserved right of reëntry, no reversion in the United States, saved either under the Idaho law as any private grantor might save it, or by virtue of antecedent title. All interest of the United States as owner is at an end. It is a stranger to the title. Even in case of an escheat the land would not go to it, but would go to the State. Therefore the statute must operate, if at all, purely by way of legislation, not as a qualification of the grant. If § 2296 is construed to apply to this case, there is simply the naked assumption of one sovereignty to impose its will after whatever jurisdiction or authority it had has ceased and the land has come fully under the jurisdiction of what for this purpose

is a different power. It is a pure attempt to regulate the alienability of land in Idaho by law, without regard to the will of Idaho, which we must assume on this record to authorize the levy if it is not prevented by an act of Congress occupying a paramount place.

I believe that this Court never has gone farther in the way of sustaining legislation concerning land within a State than to uphold a law forbidding the enclosure of public lands, which little, if at all, exceeded the rights of a private owner, although it was construed to prevent the erection of fences upon the defendants' own property manifestly for the sole purpose of enclosing land of the United States. *Camfield* v. *United States*, 167 U. S. 518. At most it was a protection of the present interests of the United States under a title paramount to the State. On the other hand, it is said in *Pollard* v. *Hagan*, 3 How. 212, 224, that no power in the nature of municipal sovereignty can be exercised by the United States within a State; that such a power is repugnant to the Constitution. This case was referred to in *Withers* v. *Buckley*, 20 How. 84, and it was decided that the act of Congress authorizing the formation of the State of Mississippi and providing that the Mississippi River should be forever free "could have no effect to restrict the new State in any of its necessary attributes as an independent sovereign government," and both these cases were cited upon this point with approval in *Ward* v. *Racehorse*, 163 U. S. 504, 511, 512. See also *Shively* v. *Bowlby*, 152 U. S. 1, 27. In *Irvine* v. *Marshall*, 20 How. 558, where it was held that the laws of a territory abolishing constructive trusts were ineffectual to protect the holder of a certificate from the United States against the establishment of such a trust, it was said that "when the subject, and all control over it, shall have passed from the United States, and have become vested in a citizen or resident of the territory, then indeed the territorial regulations may operate upon it," and

later in the decision there is cited a passage from *Wilcox* v. *Jackson*, 13 Pet. 498, 517, to the same effect—a passage also cited and relied upon by the four justices who dissented and held that the territorial laws governed even then. It has been repeated ever since. *McCune* v. *Essig*, 199 U. S. 382, 390. *Buchser* v. *Buchser*, 231 U. S. 157, 161.

Coming to the precise issue, the question of the power of the United States to restrict alienation of land within a State after it had conveyed the land in fee was left open in *Wright* v. *Morgan*, 191 U. S. 55, 58, but it was said that the clearest expression would be necessary before it would be admitted that such a restriction was imposed. In *Buchser* v. *Buchser*, 231 U. S. 157, it was held that the laws of the United States did not prevent homestead land becoming community property at the moment that title was acquired, and it was said that, the acquisition under the United States law being complete, that law had released its control. The statement in *Wilcox* v. *Jackson*, *supra*, that when the title has passed the land "like all other property in the State is subject to the state legislation," was repeated. In *Alabama* v. *Schmidt*, 232 U. S. 168, following *Cooper* v. *Roberts*, 18 How. 173, it was held that land conveyed to the State by the United States for the use of schools could be acquired by adverse possession under state law, and that the trust, although as was said in the earlier case "a sacred obligation imposed on its public faith" imposed only an honorary obligation on the State. *Northern Pacific Ry. Co.* v. *Townsend*, 190 U. S. 267, was distinguished as having been decided on the ground that in the grant to the Railway there was an implied condition of reverter in case the company ceased to hold the land for the purpose for which it was granted, a ground, which, as I have said, is absent here.

It is said that where a statute is susceptible of two constructions, by one of which grave constitutional

questions arise and by the other of which they are avoided, our duty is to adopt the latter. *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408. I am aware that this principle like some others more often is invoked in aid of a conclusion reached on other grounds than made itself the basis of decision, but it seems to me that it properly should govern here. It might without violence. When the Act of 1862, now Rev. Stats., § 2296, was passed, the United States owned territories to which it could be applied with full scope. *Irvine* v. *Marshall*, 20 How. 558. The greater part of the public land was in those territories. Without stopping to suggest other possibilities of construction this fact is enough to explain and give validity to the act when passed. There is no need to import to it the intent to anticipate the future and to reach the States that were still in the bosom of time.

Of course the United States has power to choose appropriate means for exercising the authority given to it by the Constitution. But I see no sufficient ground for extending that authority to a case like this. It is not the business of the United States to determine the policy to be pursued concerning privately owned land within a State. According to all cases in this Court, so far as I know, when the patent issued its authority was at an end.

I am aware that my doubts are contrary to manifest destiny and to a number of decisions in the State Courts. I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic. But as I have a real difficulty in understanding how the congressional restriction is held to govern this case—a question which nothing that I have heard as yet appears to me to answer—I think it worth while to mention my misgivings, if only to show that they have been considered and are not shared.